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THIRD REPORT ON STATE RESPONSIBILITY

by

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INTRODUCTION

1. Following the treatment, in the Preliminary (1988) and Second Reports (1989), 1/ of the substantive consequences of an internationally wrongful act - cessation (Art. 6), restitution in kind (Article 7), reparation by equivalent (Arts. 8, 9), satisfaction and guarantees of non repetition (Article 10) - the present report deals with what we referred to as the "instrumental" consequences of an internationally wrongful act. 2/ Be it as it may of a distinction adopted only for the purposes of a more orderly discussion, the present report addresses itself to the legal issues arising in connection with the measures that may be taken by the injured State or States against a wrongdoing State. As in the reports submitted by us so far, we shall deal, in principle, with the measures in question as applied or applicable in the case of delicts, namely of ordinary wrongful acts. References may have to be made, of course, to more or less analogous issues arising in connection with international crimes of States. These issues, however, are to be reserved in principle - in conformity with the outline submitted in the Preliminary Report - at the appropriate, next stage. 3/

2. The task the Commission is called upon to perform with regard to this part of the topic differs, however, quite considerably from that it has been performing so far with regard to the substantive consequences, as defined, of an internationally wrongful act. Two capital features characterize, de lege lata and ferenda, the régime of instrumental consequences (countermeasures). Firstly, one notes a drastic reduction, if not a total disappearence of those similarities with the régime of responsibility within national legal systems which make it relatively easy to transplant into international law, in the area of the substantive consequences, what a high scholarly authority indicated, more than half a century ago, as private law sources and analogies. 4/ As regards the main substantive consequences (with the only exception, in a sense, of satisfaction) the international "legislator" faces legal problems so similar to those the core of which has been settled for centuries in national law, that the essence of the legal relations between injured and wrongdoing State can be envisaged in terms not dissimilar from those of the omologous institutions of national systems. However numerous the issues which lend themselves to alternative solutions, the Commission had thus little difficulty, thanks to such marked analogies, to make the essential choices with a high degree of confidence in their ultimate soundness. With regard to the régime of the instrumental consequences, on the contrary, a comparative study of "corresponding" problems of national law - namely of the rules governing the ways and means to ensure the cessation of wrongful behaviours and the making good of the physical and moral injuries caused thereby - lead one to the very opposite conclusion. Whether one looks at the practice or the doctrine of international law in this area, hardly any similarity can be found.

1/ Document A/CN.4/416 and Add. 1 and Document A/CN.4/425 and Add. 1.

2/ Preliminary Report, op. cit., para. 15.

3/ Ibid., paras. 15-16

4/ Lauterpacht, H., Private Law Sources and Analogies of International Law, London, 1927.

3. The second capital feature is that in no other area the lack, in the "society of States", of an adequate institutional framework weighs so much in determining the features of any existing or even conceivable regulation of the conduct of States. We refer in particular to those two aspects of the sovereign equality of States - to the principle of which the Charter commits us all - which consist on one side of the tendency of any State large, medium or small, not to accept as a rule any higher authority above itself and on the other side of the contrast between the equality to which every State is entitled in law and the factual inequalities which tempt stronger States to impose their economic if not military power despite the principle. It follows that, except in infrequent and circumscribed hypotheses, the model represented by the remedies against wrongdoing which are available in national societies is of little avail to the international "legislator". To put it bluntly by a very old image, at no other time does the "Emperor" appear to be so "naked" as he appears at the moment when one moves from the rather satisfactory rules on the substantive consequences of State responsibility to the study of the available ways and means of redress. The fact that this is obvious to the point of appearing trite does not reduce in any measure the difficulties to be faced at this juncture.

4. Indeed, the practice is abundant but increasingly varied in quality and often very hard to assess. At the side of a bulk of cases of classic reprisals resorted to within a strictly bilateral framework but of frequently doubtful conformity to the presumable best understanding of old norms and United Nations Charter rules, one finds two major developments. On one side there is the timid and not very successful attempt at institutionalization, at universal or regional level, of impartial ways and means. On another side one must register cases of partial collectivization of measures on the part of rather occasionally concerted groups of States against a current "wrongdoer" mostly outside of the tendentially universal institutional framework: practices which, while keeping in a sense within the classic bilateral "injured State - author State" pattern, do not seem to offer, whatever the merits of each particular case, the indispensable guarantees of regularity and objectivity. One has pains to identify at times the exact content of some of the general rules put into question by some of the said unilateral practices; - uncertainties are manifest in the doctrine of the so-called "self-contained" régimes; - and it seems hard to identify the trends of further development of the law and the direction in which the Commission could prudently devise improvements to propose to the Assembly and ultimately to States. One of the crucial aspects of the latter part of the Commission's task appears to be the devising of the ways and means which - by emphasis on the best of lex lata or careful progressive development - could reduce that important source of concern which is represented by the impact of the great inequality revealed among States in the exercise of their faculté (and possibly obligation) to apply countermeasures. As we noted in our Second Report 5/ - although not without challenge - the secondary rules on cessation and reparation are in a sense relatively more "objective" than many primary ones. Their provisions operate in fact to the equal advantage or the equal disadvantage of all States, because any State, whether weak or strong, rich or needy, can find itself with equal frequency in the position of injured State or lawbreaker. Be it as it may of the substantive consequences, such is

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5/ Second Report, op. cit., para. 33.

surely not the case with regard to countermeasures. Failing adequate third party settlement commitments, the powerful or rich can more easily enjoy an advantage over the weak or needy in the exercise of the means of redress in question.

5. Whether the Commission will be able to do more in that respect in the future remains to be seen. At the side of the positive factor represented by the elimination of the main source of ideological conflict and division, that very great novelty is not exempt from preoccupying effects. At the same time, other signs recently come to the forefront, which are still rather difficult to interpret. One of the latest of these is the evocation of the hazy and ambiguous concept of a "new international order". 6/

6. The content of the present report has been conceived in the light of the indicated peculiarities of the subject-matter and of the perplexities and preoccupations that they suggest to us. Of course the main perplexities arise in the area of crimes. But is there such a clear and firm demarcation line between these and the most serious delicts? The main purpose of the present report is to identify problems, opinions and alternatives; and to elicit comment and criticism within the Commission and elsewhere on the basis of which more considerate suggestions and proposals could be submitted.

7. Considering the variety and the problematic character of the terms used to indicate the measures we are to deal with, the operative chapters of the present report are preceded by a preliminary Chapter on terminology. This will reduce the ambiguities that would derive from the variety of meanings attached to those terms in the literature as well as in the practice.

6/ The grave crisis in connection with which the "new international order" concept was evoked has also brought about interesting developments with regard to some of the consequences of that crisis which bear on State responsibility. We refer the reader to Document S/22559 of 2 May 1991.

Chapter I

Kinds of Measures to be Considered

8. International practice indicates a variety of measures to which States resort in order to secure fulfilment of the obligations deriving from the commission of an internationally wrongful act or otherwise react to the latter. Practice and doctrine classify such measures into separate categories according to factual and juridical affinities. One finds thus a variety of denominations some of which refer to one and the same concept while a number of them overlap in many ways and are differently understood depending on historical evolution and scholarly elaboration. The most widely used are self-defence (more or less distinguished from the wider concept of self-help), sanction, retorsion, reprisals, reciprocity, countermeasures, resolution and suspension of treaties, inadimplenti non est adimplendum. In English one also speaks generally of unilateral remedies; in French of réactions décentralisées as opposed, presumably, to réactions centralisées.

A. Self-defence

9. Self-defence is perhaps one of the terms most frequently resorted to in the practice and deeply analysed in the literature, 7/ mainly in the light of the official positions taken by States and of the dicta of international bodies. However, for the purposes of the instrumental consequences of international delicts, it seems not necessary to deal in detail with all the complex legal problems involved in the notion of self-defence. Indeed, the Commission has pronounced itself on self-defence within the framework of draft

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7/ See, inter alios, Waldock, H., "The Regulation of the Use of Force by Individual States in International Law", Hague Rec., Vol. 81, 1952 II, pp. 451-515; McDougal, Feliciano, "Legal Regulation of Resort to International Coercion, Aggression and Self-Defence, in Policy Perspective", in Yale Law Journal, Vol. 68 (1958-59), pp. 1057-1165; Brownlie, I., International Law and the Use of Force by States, Oxford, 1963, pp. 214-308; Delivanis, La légitime défense en droit international public modern - le droit international face à ses limites, Paris, 1971; Schwebel, S., "Aggression, Intervention and Self-Defense in Modern International Law", Hague Rec., Vol. 136, 1972, pp. 411-497; Lamberti Zanardi, P., La legittima difesa nel diritto internazionale, Milano, 1972; Zourek, "La notion de légitime défense en droit international", in Ann. IDI, 1975, pp. 1-69; Taoka, R. The Right of Self-Defence in International Law, Osaka, 1978; Ago, R., Eighth Report on State Responsibility, Doc. A/CN.4/318/Add. 5-7, in YBILC 1980, II, Part One, paras. 82-124; Cassese, A., "Commentaire à l'article 51", in La Charte des Nations Unies (Cot et Pellet, eds.) Paris, 1985, pp. 769-794; Combacau, J., "The Exception of Self-Defence in the United Nations Practice", in The Current Legal Regulation of the Use of Force (Cassese, ed.) Dordrecht, Boston, Lancaster, 1986, pp. 9-38; Dinstein, Y., War, Aggression and Self-Defence, Cambridge, 1988; Sicilianos, Les réactions décentralisées à l'illicite, Paris, 1990, pp. 291-335.

Article 34 of Part One of the project. 8/ Whatever our personal conviction on the choices then made regarding self-defence as a circumstance precluding wrongfulness, we deem it preferable, at least for the time being, not to abandon the meaning adopted within the said framework.

10. From the commentary to Article 34 it appears that self-defence has to be understood as "a reaction to ... a specific kind of internationally wrongful act", 9/ namely as a unilateral armed reaction against an armed attack. Such a reaction would consist in a "form of armed self-help or self-protection", 10/ exceptionally permitted by the "international legal order" - which nowadays "contemplate[s] a genuine and complete ban on the use of force" - in case of defence "against an armed attack by another subject in breach of the prohibition". 11/ In particular, the Commission, considering "that no codification taking place within the framework and under the auspices of the United Nations should be based on criteria which, from any standpoint whatsoever, do not fully accord with those underlying the Charter, especially when, as in the present case, the subject matter concerns so sensitive a domain as the maintenance of international peace and security", 12/ concluded that the typical legal meaning of such a notion, for the purposes of the project on State responsibility, can only be that to "suspend or negate altogether, in the particular instance concerned, the duty to observe ... the general obligation to refrain from the use or threat of force in international relations". 13/ In this way the "Commission intends ... to remain faithful to the content and scope of the pertinent rules of the UN Charter and to take them as a basis in formulating" draft Article 34. 14/

11. Even if the Commission did not want to take a stand "on the question of any total identity of content between the rule in Article 51 of the Charter and the customary rule of international law on self-defence", 15/ it is very

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8/ Document A/35/10, Comment to Article 34, in YBILC, 1980, Vol. II, (Part Two), pp. 52-61. For a doctrinal view on the choices of the Commission regarding self-defence, see Alland, "International Responsibility and Sanctions: Self-Defence and Counter-Measures in the ILC Codification Rules Governing International Responsibility, in the United Nations Codification of State Responsibility (Spinedi, Simma eds.) New York, London, Rome, 1987, pp. 143-195; and "Malanczuk, P., Counter-Measures and Self-Defence as Circumstances Precluding Wrongfulness" in ibid.

9/ Document A/35/10 op. cit., p. 53.

10/ Ibid., p. 54.

11/ Ibid., p. 55.

12/ Ibid., p. 59.

13/ Ibid., p. 60.

14/ Ibid., p. 59.

15/ Ibid.

likely that such an identity exists, as has recently been asserted by the ICJ in a well-known judgment. 16/ Just as general (customary) international law included a prohibition of force as broad as that embodied in Article 2, paragraph 4 of the Charter, it also developed a régime of self-defence identical to the régime set forth in Article 51. There would thus be probably no room as a consequence of such a development, for any of those broader concepts of self-defence which a part of the doctrine - and of State practice itself - seem to assume to have survived the Charter (as an inherent customary right) on the basis of general international law. 17/ Although, as will be shown later on, the doctrine and practice based upon such a notion are surely not negligible, their legal merits will be discussed, except for the few general remarks set forth infra, paragraphs 98 amd 99 only in connection with the consequences of international crimes: such consequences to be treated at a later stage.

12. Moving from the concept of self-defence to the more general one of self-help, we do not believe that such a concept - avoided so far by the Commission - would be useful for the purposes of the present report. It could even be misleading. Of course, in a predominantly inorganic society, in which so much reliance must be placed upon the unilateral protection of their rights by single States or groups of States, the concept of self-help ultimately characterizes the whole range of inter-State relations. 18/ But the codification on State responsibility requires a precise and more discriminating terminology which permits to stress the differences in legal régime among the various forms of reaction to a wrongful act for the proper distinctions to be made between the lawful and unlawful forms of such reactions, and their specific features.

B. Sanctions

13. Problematic in the general theory of law, the concept of sanction is notoriously even more problematic in the literature and practice of international responsibility. The only clear point is that it deals with an essentially relative notion susceptible of a variety of definitions. We suggest, however, that we leave aside those broadest definitions under which one would label as a sanction any one of the consequences of an

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16/ Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, I.C.J. Reports, 1986, p. 14, at p. 102-103.

17/ On this point see infra, para. 100.

18/ On self-help, see Heilborn, Das System des Völkerrechts, Berlin, 1896, pp. 325, 334, 371; Anzilotti, Corso di diritto internazionale, Vol. III, Rome, 1915, pp. 155 ff., 165 ff.; Bowett, Self-Defence in International Law, Manchester, 1958, p. 11; Verdross, Völkerrecht, 5 Aufl., Wien, 1964, p. 428; Forlati Picchio, La sanzione nel diritto internazionale, Padova 1974, pp. 11, 83 ff. (and passim); Lamberti Zanardi, op. cit., p. 15; Ago, Eighth Report on State Responsibility (Addendum), YBILC, 1980, Vol. II, (Part One), para. 95; Partsch, "Self-preservation", in Enc. of Pub. Int. Law, Vol. IV, 1982, p. 217-220.

internationally wrongful act, including not only the measures by which States may secure cessation or reparation but the substantive right to obtain cessation and/or reparation as well.

14. A relatively recent authoritative work identifies international sanctions with the "consequences of an [internationally] wrongful act, unfavourable to the offender, provided by or admitted under international law". Within such a framework a "sanctioning action" would be "any conduct detrimental to the interests of the offending State, apt to pursue reparatory, punitive, possibly preventive purposes and either provided for or simply not prohibited by international law". 19/ Thus understood, sanction would seem to cover not only such measures as retorsions and reprisals - inclusive in their turn of the so-called "reciprocity" (infra, paras. 28-32) - but self-defence as well. Other recent scholarly elaborations submit that the above definition is acceptable except in the measure in which it extends the concept to actions in self-defence. Such actions would not really be sanctions for the same reasons that distinguish them from reprisals. 20/

15. A more specific, circumscribed meaning of sanctions seems, however, to prevail in the contemporary doctrine 21/ and to find some support in the work of the Commission itself. In particular, by using in draft Article 30 of Part One the terms "measures" and "countermeasures" instead of the term "sanction" proposed by Ago to describe the so-called "unilateral", "horizontal" (State-to-State) forms of reaction to an unlawful act, the Commission reserves indeed the term sanction to measures adopted by an

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19/ Our paraphrased translation from Forlati Picchio, L., La sanzione nel diritto internazionale, Padova 1974 p. 40. It is regrettable that this highly valuable work should not be available to scholars unable to understand the Italian language. A review in French has appeared in the RGDIP, 1978, (Rousseau), p. 557-558, one in English in Italian Yearbook of International Law, Vol. 1, 1975, pp. 377-79 (Ferrari Bravo), and one in German (Verdross, A.) in the Osterreichische Zeitschrift für öffentliches Recht, Vol. 28, 1977, pp. 374-375.

20/ Lattanzi, F., "Sanzioni internazionali", Enciclopedia del diritto, Vol. XLIII, Milan, 1989, para. 2.

21/ De Guttry, A., La rappresaglie non comportanti la coercizione militare nel diritto internazionale, Milano, 1985, p. 36; Leben, C., "Les contre-mesures inter-étatiques et les réactions à l'illicite dans la société internationale", AFDI, Vol. 28, p. 19. Essentially on the same line seems to place himself Dupuy, P.M., "Observations sur la pratique récente des 'sanctions' de l'illicite", RGDIP, Vol. 87, 1983, p. 517. By using this term to indicate measures adopted by a number of States by way of reaction to (presumably) erga omnes violations, the latter author seems to differentiate such measures from ordinary "horizontal" reprisals and to place them closer to the "vertical" measures ("sanctions") provided for by international institutions. Similarly, Dominicé, Ch., Observations sur les droits de l'Etat victime d'un fait internationalement illicite, in Droit International 2, Paris, 1982, p. 33; and the ILC debate on draft Article 30 of Part One: YBILC, 1979, Vol. I, 1544th Meeting.

international body. It referred notably to international measures adopted by such a body following a wrongful act "having serious consequences for the international community as a whole, in particular ... to the ... measures [adopted] by the United Nations under the system established by the Charter to maintain international peace and security". 22/ It is our submission that the rather low degree of "verticality" of the measures taken by international bodies might not really justify the abandonment of a concept which may still serve a useful purpose to describe the function of those strictly unilateral or "horizontal" State measures upon which the effectiveness of international law still so largely depends. 23/ We feel, however, that in conformity with the Commission's choice, the term sanction should better be reserved to designate the measures taken by international bodies. Only when we shall deal with the consequences of crimes, it might be worthwhile to see whether the term sanction could be extended to measures which, although emanating from States collectively, would not qualify as measures taken by an international body.

C. Retorsions

16. According to the majority of scholars this term would cover such reactions of a State to an unlawful, unfriendly act, as are themselves unfriendly but not unlawful 24/. In a partly different sense the term is used by Politis, 25/ Oppenheim, 26/ Morelli, 27/ Skubiszewski 28/ and

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22/ "Annuaire CDI, 1979, vol. II, No. 2, p. 34, point 21; and Malanczuk, P., op. cit., p.206, in the United Nations Codification ...

23/ Considering the very close relationship between the function of sanctions and the "effectiveness or even the existence of international law" and considering further the essentially inorganic structure of international society and the difficulty of distinguishing between "civil" and "penal" aspects of State responsibility, we believe that the concept is still indispensable - as well as the concept of reprisals - for the analytical study of international responsibility. See Combacau, J., "Sanctions", in Encyclopedia of Public International Law, Vol. 9, 1986, p. 337; and Partsch, K.J., "Reprisals" and "Retorsion", ibid., pp. 334-335, pp. 335-337.

24/ Akehurst, M., A Modern Introduction to International Law, London 1987, p. 6; Sur, in Droit International Public (Thierry, Sur, Combacau, Vallée), Paris 1981, p. 192; Zemanek, K., "Responsibility of States: General Principles", in Enc. of Pub. Int. Law, Vol. X, 1987, p. 370; Partsch, K.J., "Retorsion", ibid., Vol. IX, 1986, p. 335.

25/ In his IDI Report on the "Régime des représailles en temps de paix", in Ann. IDI., 1934, Vol. 38, p. 10.

26/ International Law, Vol. II, London 1952, pp. 134-35.

27/ Nozioni di Diritto Internazionale, Padova 1967, p. 361.

28/ In Sørensen, M., Manual of Public International Law, London 1968, p. 753.

Paniagua, 29/ who confine the term to unfriendly measures taken in response to equally unfriendly acts, thus excluding unfriendly measures taken in response to unlawful acts. One would thus leave outside of the concept (and possibly find no systematic place for) any unfriendly measures taken by way of reaction to an unlawful act. We deem it more practical for the present purposes to use the term retorsion or retaliation to indicate unfriendly but lawful action in response to a prior internationally wrongful act.

17. In describing retorsion some writers like to refer to the sphere of discretionary action pertaining to each State. 30/ Others prefer to speak, either of a sphere of non regulated conduct of States or of international comitas. 31/ Others stress the existence in the habitual behaviour of States of a margin favourable to a another State or its nationals. 32/ Such a margin would encompass measures of retorsion, that is, acts which deprive the allegedly responsible State of an advantage to which it had no proper right prior to the wrongful act. 33/

18. Although acts of retorsion belong per se to the sphere of permissible, lawful conduct, some authors wonder whether resort thereto is not subject to legal limitations. For instance, Schachter refers to the hypothesis where

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29/ "Las represalias en el derecho internacional - Perspectiva Historica", in Rev. Jur. de Catalunya 1984, Vol. I, pp. 160 ff.

30/ Leben, C., op. cit., p. 14.

31/ Zoller, E., Peacetime Unilateral Remedies: an Analysis of Countermeasures, New York, 1984, pp. 5ff. On the restriction of the sphere of discretionality (of retorsions) due to the thickening of the international regulation of trade relations see Partsch, K.J., op. cit., p. 336; Gianelli, A., op. cit. infra., para. 46, note 86, Part 1A, Chap. 1, para. 4, pp. 22.

32/ Reuter, P., Droit International Public, Paris, 1983, p. 463.

33/ Zoller, E., Quelques réflexions sur les contre-mesures en Droit International Public, in Etudes Colliard, Paris 1984, p. 364. Adhering to the prevailing doctrine, our distinguished predecessor Riphagen includes the suspension of diplomatic relations among retorsions. In view of the inexistence, in his opinion, of any de lege lata obligation in this respect, the suspension of diplomatic relations is neither an unlawful act nor a reprisal. The said measure could always be adopted in response to an internationally wrongful act (Fourth Report, YBILC, Vol. II, (Part One), 1983, para. 110, p. 20-21).

"an otherwise permissible action is taken for an illegal objective". 34/ De Guttry mentions the possible contradiction between acts of retorsion which may endanger "international peace and security, and justice" and the obligation to settle disputes by peaceful means as provided for in article 2, paragraph 3 of the Charter. 35/

19. If one accepts the notion of retorsion as covering acts not unlawful per se (albeit less than friendly), such a concept should not find a place within the framework of a codification of State responsibility. Although retorsions are and may be resorted to by way of reaction to an internationally wrongful act, they do not give rise to the legal problems which are typical of the other forms of reaction to be considered for the purposes of the draft Articles on State responsibility. Acts of retorsion may nevertheless call for some attention in view of the fact that international practice does not always show a clear distinction of measures consisting of violations of international obligations from measures which do not pass the threshhold of unlawfulness.

D. Reprisals

20. Once self-defence, sanctions and retorsions were set aside, a further traditional concept to be considered - and the oldest and the most important one - is that of reprisals.

21. It is perhaps not useless to recall that the notion of reprisal originally indicated, in interindividual systems, the measures used directly by the aggrieved party as a means of securing direct reparation. During the Middle Ages a person who had suffered an injustice in a foreign country and was formally refused satisfaction by that country's sovereign, could turn to his own sovereign and request "lettres de marque". These "lettres de marque" contained an official authorization of the sovereign for the injured party to resort to reprisals against the property of the nationals of the foreign State present in his own country, or at sea. 36/ "Private reprisals" were later replaced by "public" or "general reprisals", only "nations" being entitled to resort to them. 37/ De Vattel described reprisals as follows: "Reprisals are used between nation and nation, in order to do themselves justice when they cannot otherwise obtain it. If a nation has taken possession of what belongs to another - if she refuses to pay a debt, to repair an injury, or to give adequate satisfaction for it - the latter may seize something belonging to the

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34/ Schachter, O., "International Law in Theory and Practice, General Course in Public International Law", Hague Rec., Vol. 178, 1982-V, pp. 9-396, p. 185.

35/ See De Guttry, A., op. cit., pp. 25-26; Weber, H., "Unfriendly Act", in Enc. of Pub. Int. Law, op. cit., 1982, Vol. IV, p. 253.

36/ Yves de la Brière, "Evolution de la doctrine et de la pratique en matière de représailles", Hague Rec., Vol. 22, 1928 II, p. 239-291, p. 255.

37/ E. de Vattel, The Law of Nations, or, Principles of the Law of Nature, applied to the conduct and affairs of Nations and Sovereigns, London, 1811, p. 285, section 347.

former, and apply it to her own advantage till she obtains payment of what is due to her, together with interest and damages - or keep it as a pledge till she has received ample satisfaction.". 38/

22. Most modern authors see a reprisal as a conduct which, "per se unlawful in as much as it would entail the violation of the right of another subject, loses its unlawful character by virtue of being a reaction to a wrongful act committed by that other subject". 39/ Anzilotti defined reprisals as "actes objectivement illicites par lesquels un Etat réagit contre le tort à lui fait par un autre Etat". 40/ A less concise definition was adopted in 1934 by the International Law Institute, whereby reprisals are "des mesures de contrainte dérogatoires aux règles ordinaires du droit des gens, prises par un Etat à la suite d'acte illicite commis à son préjudice par un autre Etat et ayant pour but d'imposer à celui-ci, au moyen d'un dommage, le respect du droit". 41/

23. In the contemporary literature a narrow concept of reprisal is proposed by some authors, whereby the concept would exclude measures of reciprocity. The term reprisal would thus only cover such reactions to a wrongful act as violate a different norm to that violated by the wrongful act itself: "While reciprocity gives rise to non-performance of an obligation similar (by identity or by equivalence) to the violated obligation, reprisals consist in the non-performance of a different rule". 42/ But we shall revert to reciprocity in due course. 43/

24. According to a widely shared view the term reprisal would apply preferably to the measures adopted by way of reaction to an internationally wrongful act by an injured party against the offending State ("horizontal" measures), whereas the term "sanction" would more properly apply, as recalled earlier, to the measures taken against the wrongdoing State by an international body (so-called "vertical" measures).

25. Considering the pretty clear connotation that the term reprisal has acquired in the practice and doctrine of unilateral State reactions to internationally wrongful acts, it is our belief that most such reactions - in so far as they do not qualify as retorsions or self-defence - are properly covered, in principle, by that classic term. The reasons which may make other

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38/ Ibid., p. 283-284 section 342. Similar descriptions had already been given by Hugo Grotius, De Jure Belli ac Pacis, Libri Tres, The Classics of International Law, J.B. Scott, ed., Washington, 1925, p. 629, and Sir Robert Phillimore, Commentaries upon International Law, Vol. VII, London, 1885, p. 32.

39/ Morelli, G., op. cit., p. 361 (as translated by us).

40/ Anzilotti, D., Cours de droit international, traduction française, (Paris 1929), p. 515.

41/ Ann. IDI, Vol. 38, 1934, p. 708.

42/ Zoller, E., Peacetime, op. cit., p. 43.

43/ Infra, paras. 28-32.

terms preferable, are either the greater generality of the latter (such being particularly the case of "measures" or "countermeasures") or the frequent association of acts of reprisal with the notion of measures involving the use of force. 44/

E. Countermeasures

26. As noted in our Preliminary Report, the term "countermeasures" is a newcomer in the terminology of the consequences of an internationally wrongful act. 45/ Significant examples are in the Air Services, United States Diplomatic and Consular Staff in Tehran and Military and Paramilitary Activities in and Against Nicaragua decisions. 46/ Article 30 of Part One of the draft Articles, as adopted on first reading, uses the term "measure" in the text and "countermeasures" in the title.

27. Although divergent views are expressed in the literature with regard to both the degree of propriety of the term countermeasures and the kinds of measures it covers, 47/ writers seem generally inclined to consider the concept as the most suitable to embrace the generality of the measures that may be resorted to in order to seek cessation or redress. 48/ A number of

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44/ On this last aspect, see Dominicé, op. cit., p. 33.

45/ Preliminary Report, op. cit., para. 14, note 8.

46/ Case Concerning the Air Services Agreement of 27 March 1946, International Law Reports, Vol. 54, 1979, p. 320, p. 337; Case Concerning United States Diplomatic and Consular Staff in Tehran, I.C.J. Rep. 1980, p. 3, p. 27; Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Rep., 1986, p. 14, p. 127.

47/ Elagab, for instance, The Legality of Non-Forcible Countermeasures in International Law, Oxford, 1988, p. 4, seems to exclude "forcible" reprisals; Zoller seems to consider the term to cover all non-armed measures and suspension of treaties, leaving out reciprocity and treaty termination. In her view, an essential feature of countermeasures would be their coercive purpose: such a purpose being present only where the reaction goes beyond the limit of "identity/equivalence" (reciprocity) and excluded in case of adoption of such a definitive measure as termination of the treaty, Peacetime, op. cit., p. 75; the Restatement of Law Third uses the term countermeasures in Article 905 covering "Unilateral Remedies". According to the "Comment" countermeasures are "measures that would be unlawful where they are not in response to a violation" and include: "suspension or termination of treaty relations generally or of a particular international agreement or provision; freezing of assets of the offending State; imposition of other economic sanctions", Restatement, op. cit., pp. 380-381.

48/ See, inter alios, Reuter, P., Droit international, op. cit., p. 465, and Dupuy, P.M., op. cit., p. 527.

authors note that the Commission itself understood the term in question, as used in draft Article 30 of Part One of the Draft, as inclusive of the measures traditionally classified as reprisals as well as the "sanctions" decided upon or applied by international bodies. 49/ Although we do not see any obstacle to such a broad interpretation of the term as used in the cited draft Article, we shall use it (here and in further developments on the consequences of delicts) to indicate essentially the so-called unilateral or "horizontal" reactions of one or more States to an internationally wrongful act, to the exclusion of self-defence and retorsions. Letting aside for the time being, the choice of the term or terms which will appear to be most suitable for the single draft Articles by which to cover the relevant aspects of what we refer to as the instrumental consequences of internationally wrongful acts, it can be said that the term countermeasures seems to present itself (despite our initial reservations) as the most neutral and as such the most comprehensive of the various kinds of measures injured States may be lawfully entitled to take severally or jointly against the author State or States. This would be without prejudice, for the time being, to any subdivisions which may appear to be appropriate to ourselves or, mainly, to the Commission.

F. Reciprocity measures

28. The main issue here is whether a distinction may be justified and practically useful between reprisals (or the countermeasures so qualified) on the one hand and the measures taken, so to speak, by way of mere reciprocity, on the other hand.

29. It is well-known that the concept (as well as "principle") of reciprocity applies in various areas of international law and relations. "La reciprocité exprime l'idée d'un retour, d'un lien entre ce qui est donné de part et d'autre. De ce lien peuvent être tirées un certain nombre de conséquences juridiques, en ce qui concerne notamment l'exigibilité des engagements échangés. En comprenant plus largement encore cette idée de retour, pour justifier toute symmetrie des attitudes, on trouve la réciprocité à la base de la rétorsion et des représailles". 50/ Moving from such a very broad meaning, a number of authors use the term reciprocity to indicate a certain kind of unilateral reaction to an internationally wrongful act. According to our distinguished predecessor, for example, "[r]eciprocity meant action consisting

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49/ Malanczuk, P., in the United Nations Codification ..., op. cit., pp. 203ff; Leben, C., op. cit., pp. 15-17; Dominicé, Ch., op. cit., p. 33; Dupuy, P.M., op. cit., p. 528.

50/ Virally, M., "Le principe de réciprocité dans le droit international contemporain", in Hague Rec. 1967-III, p. 100. In the same sense, cfr. Simma, B., "Reciprocity" in Enc. of Pub. Int. Law, Vol. VII, 1984, pp. 402-404. The different opinion that the ratio of reprisals is distinct from that of reciprocity is expressed by Kalshoven, F., Belligerent Reprisals, Leyden 1971, p. 24-25.

of non-performance by the injured State of obligations under the same rule as that breached by the internationally wrongful act, or a rule directly connected therewith". 51/

30. More articulately other writers identify two possible kinds of reciprocity. One is reciprocity "by identity" ("par identité") in the case where a reaction takes place under "conditions which are exactly the same for both parties". The other is reciprocity "by equivalence" ("par equivalent") in the case where "identity of conditions cannot be insured", i.e. when the States "are not bound by the same obligations". 52/ In the latter case, reciprocity will take the form of non-performance of the counterpart's quid pro quo obligation (namely, of what Forlati calls "prestazione corrispettiva") or of the non-performance of an obligation of "equal value or equal meaning" (as Zoller calls) of the infringed reciprocal obligation.

31. Now, while most writers do not believe that "reciprocity by equivalent" corresponds to a kind of measures distinct from reprisals - or, more generally, countermeasures - a few authors seem to maintain that the former are distinct and should as such be subject to a different legal régime. 53/ Our predecessor Riphagen, for his part, while dealing with reciprocity measures within the general framework of countermeasures does make them the object of a provision separate from the draft Article dealing with reprisals. The distinction would be necessary, in his view, because measures by way of reciprocity would be intended to restore the balance between the position of the offending State and that of the injured party, while reprisals would be intended instead to "put pressure" on the offending State in order to secure compliance with the new obligation arising from the wrongful act. As for the conceptual basis of reciprocity measures, Riphagen finds it in the existence of the synallagmatic relationship or "échange de prestations" which is the object and raison d'être of the infringed norm. Reciprocity would thus be achieved through the suspension, on the part of the injured State, of compliance with the obligations corresponding to those violated by the offending State. Reprisals, on the contrary, would presuppose the inexistence of a legal link between the infringed obligation and the obligations the performance of which is suspended by the injured State. 54/

51/ YBILC, 1984, I, p. 318.

52/ Zoller, E., Peacetime, op. cit., p. 19-20; Virally, M., op. cit., p. 22ff.; and Forlati Picchio, who speaks of "sospensione della prestazione reciproca" with regard to réciprocité par identité and "sospensione della prestazione corrispettiva" with regard to réciprocité par équivalent (La sanzione, op. cit., p. 93, note 116).

53/ Zoller, Quelques réflexions, op. cit., p. 364.

54/ Cfr. Sixth Report YBILC, Vol. II, (Part One), comment to art. 8, p. 11. The distinction proposed by Riphagen is explicitly criticized by Pisillo Mazzeschi, R., "Termination and Suspension of Treaties for Breach in the ILC Works on State Responsibility" (in Spinedi - Simma (eds.) The United Nations Codification of State Responsibility, N.Y., London, Rome, 1987), p. 794. He shares the prevailing concept of reciprocity as a specific form of reprisal. Critical is also Malanczuk, P., "Zur Repressalie Im Entwurf der International Law Commission zur Staatenverantwortlichkeit", in ZaöRV, Vol. 45, 1985, p. 315.

32. The question should be settled by an accurate study of practice. The practice of States should notably tell us whether the reactions qualified as "reciprocity measures" are or should be subjected to conditions, limitations or other requirements different from those obtaining for reprisals or countermeasures in general or whether any special features the said reciprocity measures may present are simply justified by a more articulate application of the very same principles governing reprisals or countermeasures in general.

G. Inadimplenti non est adimplendum. Suspension and Termination of Treaties.

33. An analogous question arises with regard to the measures commonly referred to by the maxim inadimplenti non est adimplendum and for the suspension and termination of treaties. It is known that, although the tenet inadimplenti non est adimplendum would seem literally to be applicable to non-compliance with any international obligation, irrespective of its conventional or customary origin, it is traditionally used to indicate the so-called reciprocity measures within a treaty context. 55/

55/ Significant, in this respect, is the statement contained in the United States Memorial presented to the Arbitral Tribunal in the Air Services Case: "International law recognizes that a party to an agreement which is breached by the other party may reciprocally suspend proportional obligations under the agreement. Available countermeasures range from formal termination of an agreement in the event of a material breach, to an interim withdrawal of corresponding rights of the other party while other rights and obligations remain in effect. As the International Law Commission has stated, a violation of a treaty obligation, as of any other obligation, may give rise to a right in the other party to take nonforcible reprisals, and these reprisals may properly relate to the defaulting party's rights under the treaty. This generally recognized principle serves as one of the most important sanctions behind international law - namely reciprocity. No State can validly claim from other States, as a matter of binding obligation, conduct which it is not prepared to regard as binding upon itself. This right to take proportional countermeasures has been specifically affirmed in the context of bilateral international aviation agreements. In his comprehensive treatise, The Law of International Air Transport at 482, Bin Cheng focuses specifically on this question in the context of the Bermuda-type bilateral air transport agreements and the practice of the United Kingdom. He concludes that: "When in the opinion of one of the parties (to a Bermuda-type agreement) the other contracting party has committed a breach of an agreement [,] ... the principle inadimplenti non est adimplendum applies and the party aggrieved is entitled to take proportionate retaliatory measures" (in Digest of United States Practice in International Law 1978, pp. 769-770, pp. 37-41 of the United States Memorial). Numerous writers use indistinctly, at the side of inadimplenti non est adimplendum the expression exceptio inadimpleti contractus. A different view seems to be held by Zoller, who refers to exceptio inadimpleti contractus only with respect to treaty obligations and sees the other maxim (inadimplenti non est adimplendum) as just another way of expressing the principle of reciprocity, regardless of the source (custom or treaty) of the obligations in question (Peacetime, op. cit., p. 15 and Quelques réflexions, op. cit., p. 364). See also Reuter, op. cit., p. 464; and Politis, (Ann. IDI, 1934, Vol. 38, op. cit., p. 10) who believed that

34. By suspension and termination of treaties one refers instead, of course, to the particular consequences of non-compliance with treaty obligations codified in Article 60 of the Vienna Convention on the Law of Treaties. Part of the doctrine considers both these consequences as inadimplenti non est adimplendum corollaries. This part of the doctrine believes that reciprocity manifests itself when unlawful action and reaction both find their place within the context of the treaty, non-compliance with which would (in given circumstances) justify it. As noted in paragraphs 31 and 33 above with regard to the relationship between reprisals and reciprocity, one finds, here again, essentially - except for minor, although by no means negligible, peculiar features - just a species of reprisals. 56/ Another part of the literature, while admitting that suspension and termination of treaties are applications of the principle inadimplenti non est adimplendum, stresses instead the autonomy of suspension and termination within or without the framework of Article 60 of the Vienna Convention on the Law of Treaties. 57/ The autonomy of suspension and termination from reprisals would be justified by differences relating, inter alia: - to the purpose of the measures, considered to be aimed at securing reparation directly instead of merely coercing the wrongdoer to provide therefor; - to the object, which in the case of suspension or termination would be confined to responding to non-compliance with a treaty obligation; - to the regulation of procedural conditions, which is more detailed.

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exceptio inadimpleti contractus indicated within a treaty context, the refusal of a State to comply with an obligation by reason of the non compliance with the correlative (synallagmatic) obligation of the other party: a refusal which would have been not a reprisal but a lawful way of terminating conventional obligations.

56/ In this sense, see, inter alios, Morelli, G., op. cit., p. 327; Guggenheim, Traité de droit international public, I, Genève, 1967, p. 227; Akehurst, M., "Reprisals by Third States", in BYIL, Vol. XLIV 1970, pp. 6-12 and 16; Lattanzi, F., Garanzie, op. cit., p. 294; Pisillo Mazzeschi, op. cit., pp. 57-94.

57/ An original position is taken by Zoller. According to her the fact that suspension and termination - as forms of reaction to a wrongful act - do not present such features as identity and equivalence, places them outside of the ambit of reciprocity proper. In the cited author's opinion, among measures resorted to by way of reaction to non-compliance with a treaty, one distinguishes inadimplenti non est adimplendum (reciprocity) from suspension and termination. The former kind of reaction (reciprocity) would consist in the mere non-compliance with an obligation deriving from the treaty. Suspension and termination, instead, would consist in the obliteration - definitive or temporary - of the very legal existence of the treaty obligation involved (Zoller, E., Peacetime, op. cit., p. 28). On the said distinction, see, furthermore, Simma, Reflections on Article 60 of the Vienna Convention, in OZöR, Vol. 20, 1970, pp. 5-83; Forlati Picchio, L., Le Sanzione, op. cit., pp. 76-81; and Politis in Ann. IDI, op. cit., p. 60.

35. The problem involved here is to see whether practice may justify a distinction of such "conventional" measures as treaty suspension and termination from countermeasures in general not only for merely descriptive reasons but in view of the legal régime to be codified or otherwise adopted by way of progressive development. As well as the question of the so-called "reciprocity measures" in general, the issues relating to these two "conventional" measures - issues connected with the relationship between the law of treaties and the law of State responsibility - will have to be the object of further study before any draft Articles are formulated.

H. Object of the following chapters

36. The following Chapters are devoted to the identification, also in the light of the most authoritative and recent literature, of the various problems of the legal régime of the countermeasures to which States may resort as a consequence of internationally wrongful acts (including reprisals, reciprocity measures, inadimplenti non est adimplendum, suspension and termination of treaties). With regard to each set of problems we shall try to envisage, with the help of the literature, the possible directions in which the codification and development of that régime could proceed. This with a view to soliciting comment and advice from our colleagues in the Commission and possibly from the Members of the Sixth Committee.

Chapter II

An Internationally Wrongful Act as a Precondition

37. While most writers believe, on the basis of well-known jurisprudential dicta, that a lawful resort to countermeasures presupposes an internationally unlawful conduct of an instant or continuing character, 58/ a few scholars seem to believe that resort to measures could be justified even in the presence of a good faith conviction, on the part of the acting State, that it has been or is being injured by an internationally wrongful act. 59/

38. Confronted with the alternatives of "necessity of a wrongful act" and "sufficiency of the injured State's good faith belief" or the mere allegation that a wrongful act has been committed, we would be inclined to think that the

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58/ An exemplary definition of this requirement is the well-known Naulilaa case: "La première condition - sine qua non - du droit d'exercer de répresailles est un motif fourni par un act préalable, contraire au droit des gens" (Unriaa, vol. II, p. 1027). The same Tribunal in the Cysne case emphasized: "There is no legal justification for reprisals except when they have been provoked by an act contrary to international law", Ann. Dig. of Public International Law Cases, 1929-30, p. 490. It is significant that on the occasion of the 1930 Hague Codification Conference the question "What are the conditions which must be fulfilled when the State claims to have acted in circumstances which justified a policy of reprisals?" was met by all the answering States with the indication that a prior wrongful act was an indispensable prerequisite, League of Nations, Conference for the Codification of International Law: Bases of discussion, vol. III, 1929, pp. 128-130). In the same sense, see also, Article 1 of the IDI Resolution of 1934 (Ann. IDI, Vol. 38, 1934, p. 163), and draft Article 30 of Part One of the project on State Responsibility (YBILC 1979, Vol. II, (Part Two), p. 115).

59/ This seems to be the opinion, for example, of the arbitral tribunal in the Air Services Case where the arbitrators affirmed that it was: "quite obvious that the lawfulness of the action must be considered regardless of the answer to the question of substance concerning the alleged violation", ILR, Vol. 54, pp. 319 ff, notably para. 74. This understanding is confirmed by the fact that in the same case, as noted approvingly by Fisler Damrosch, "the Tribunal consistently refers to the 'alleged breach' or 'alleged violation' as giving rise to the other party's right to take responsive action" ("Retaliation or arbitration - or both? The 1978 U.S. - France aviation dispute", in AJIL, 1980, p. 796). A similar view is expressed by Dominicé, who deems it unrealistic to require certainty as to the existence of a prior violation and concludes that reprisals are measures intended to react "à un manquement, réel ou allégué" (Dominicé, Ch., op. cit., pp. 40-41). Also Fenwick speaks of reprisals or measures in reaction to "alleged illegal acts" ("International Law", IV ed., New York 1965, pp. 636-637).

prerequisite for a lawful resort to measures ought to be the first one. 60/ However, we do not think that this problem is of any real relevance for the present purposes. While it is indeed an essential one in order to determine whether a cause of exclusion of wrongfulness does come into play under draft Article 30 of Part One of the project as a justification for countermeasures, the determination of the prior commission of an internationally wrongful act is simply a necessary assumption from the viewpoint of the regulation of the contents, forms and degrees of responsibility. It is obvious, in other words, that the lawfulness of any one of the measures with the legal régime of which the Commission is to deal in the Second Part of the project necessarily presupposes the existence of that condition of a prior unlawful act which is governed by Part One.

60/ Of the same opinion seem to be Wengler, "Public International Law: paradoxes of a legal order", in Hague Rec., 1977-V, p. 20; Zoller, E., Peacetime, op. cit., pp. 95-96; Elagab, O.Y., op. cit., pp. 43-50; Salmon, in "Responsabilité Internationale", Paris 1987/88, p. 179.

Chapter III

Functions of Measures and Aims Pursued

39. Of not little relevance, albeit controversial, is the question of the functions and purposes of measures. In the literature, the variety of opinions on the subject is determined in a considerable part by the general concepts of international responsibility each scholar assumes as a starting point. 61/

40. In the less recent doctrine, the writers who start from the concept of an internationally wrongful act as a sort of, so to speak, predominantly "civil" nature, are inclined to see reprisals as instruments for the pursuit of an essentially restitutive/compensatory end. 62/ Those who conceive internationally wrongful acts as delicts of a predominantly "penal" or criminal nature assign to reprisals an afflictive, punitive or retributive function. 63/ The International Law Institute's 1934 Resolution expresses itself on this aspect by stating that reprisals are measures "ayant pour but d'imposer à (l'Etat qui a commis l'acte illicite), au moyen d'un dommage, le respect du droit." In this definition two features are of significance from the present point of view. One is the verb "imposer", indicating the coercive role the injured State performs - in either direction - within the essentially "horizontal" legal relationship in which international responsibility obviously consists. The other feature are the terms "dommage" and "respect du droit", which seem to emphasize, at the side of the reparatory function implied in respect du droit, the idea of retribution, implicit both in "dommage" and "respect du droit". The Institut would thus seem to place itself on an ambivalent position. More specifically to a mainly compensatory concept of measures seems to adhere Oppenheim, when he stresses the "compulsive", together with an essentially reparatory role of reprisals. 64/

61/ See on the whole matter of the purposes of reprisals, Sicilianos, op. cit., pp. 49-69.

62/ See, for example, Anzilotti, D., op. cit., pp. 165-167, to be read in the light of the well-known remarks in Teoria generale della responsabilità dello Stato nel Diritto Internazionale, Firenze, 1902, pp. 95-96. In analogous sense see also, De La Brière, Y., op. cit., p. 241; Bourquin, M., "Règles générales du droit de la paix", Hague Rec., Vol. 35, 1931 I, p. 222; and the accurate remarks by Politis, op. cit., pp. 28-29, in his IDI Report, in which the reparatory nature of reprisals is confirmed by his observation that the right to act in reprisal begins only after the State author of the wrongful act refuses reparation and ceases at the moment in which reparation is obtained.

63/ See, for example, Kelsen, H., "Unrecht und Unrechtsfolge im Völkerrecht", in ZöR, Vol. 12, 1932, pp. 571 ff.

64/ Oppenheim, L., Vol. II, London, 1952, op. cit., pp. 136 ff.

41. In the post-Second World War literature the doctrinal debate is characterized by the position of those who see in reprisals a measure exclusively instrumental to cessation and reparation, on one side, and those who believe that reprisals are instrumental to both reparation and retribution (punishment), on the other side. The first tendency is represented, inter alios, by Skubiszewski, 65/ Venezia, 66/ Lamberti Zanardi, 67/ Zourek, 68/ Brownlie, 69/ Dupuy, 70/ Paniagua, 71/ Zemanek 72/ and the American Law Institute's Restatement of Law Third. 73/

42. The eclectic or "dual" concept (with some emphasis upon the retributive role) seems to be preferred instead by Forlati Picchio, 74/ Lattanzi, 75/ and, perhaps in a more nuancé form, by Morelli 76/ and Ago. According to the latter's position expressed in his Eighth Report "[t]he peculiarity of a sanction is that its object is essentially punitive or repressive; this punitive purpose may in its turn be exclusive and as such represent an objective per se, or else it may be accompanied by the intention to give a warning against a possible repetition of conduct like that which is being punished, or again it might constitute a means of exerting pressure in order

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65/ Skubiszewski, K.J., op. cit., p.753.

66/ Venezia, "La notion de répresaille en droit international public", in RGDIP, Vol. 64, 1960, pp. 467-468.

67/ Lamberti Zanardi, op. cit., p. 131 ff.

68/ Zourek, La notion, op. cit., p. 60.

69/ Brownlie, I., System of the Law of Nations, State Responsibility, Part One, Oxford, 1983, p. 34.

70/ Dupuy, P.M., op cit., p. 530.

71/ Paniagua, op. cit., p. 158.

72/ Zemanek, The Unilateral Enforcement of International Obligations, in ZaöRV, Vol. 47, 1987, p. 37 and "Responsibility of States: General Principles", Enc. of Pub. Int. Law, Vol. 10, 1987, p. 370.

73/ According to the Restatement the emphasis would seem to be placed on cessation/reparation: "The principle of necessity ordinarily precludes measures designed only as retribution for a violation and not as an incentive to terminate a violation or to remedy it". Restatement Third, op cit., Vol. 2, p. 382.

74/ Forlati Picchio, L., op. cit., pp. 63-65.

75/ Lattanzi, F., op. cit., pp. 242-243.

76/ Morelli, G., op. cit., p. 363.

to obtain compensation for a prejudice suffered". 77/ While placing themselves within the same trend, Sereni, Cassese and Conforti do not seem to stress any one of the concurring functions. Bowett, for his part, while recognizing the punitive function of reprisals, specifies that they serve "to impose reparation for the harm done, or to compel a satisfactory settlement of the dispute created by the initial illegal act, or to compel the delinquent State to abide by the law in the future". 78/

43. The study of the function of measures (and the aims pursued or pursuable by the injured State thereby) is the object of more particular care in some recent works on reprisals. In some of these works a marked predominance is assigned to coercion for restitutive/reparatory purposes. 79/ Zoller, for example, believes that "peacetime unilateral remedies" perform "three distinct 'purposes': 'reparation', 'coercion', 'punishment'; and assigns to 'countermeasures' exclusively the second of these purposes, namely 'coercion'". 80/ Elagab identifies the functions of reprisals in "self-protection", "reciprocity", and inducement to "an expeditious settlement of a dispute". Unlike Zoller and others he - as well as Lamberti Zanardi 81/ - do not seem to exclude an "executive" function, namely the use of reprisals by the injured State in order to secure reparation directly. 82/

77/ Eighth Report, Addendum, op. cit., para. 90.

78/ Bowett, D., op cit., AJIL 1972, p. 3.

79/ De Guttry, A., for example, defines reprisals as "a form of pressure" aimed at securing that the offending State "modify its conduct in order to comply with its international obligations" (op. cit., p. 12). Reprisals would thus not perform a directly executive but an "indirect self-help" function by applying a kind of instrumental coercion in order to induce the offending State to comply with its obligations: - an aim which would include cessation as well as reparation (op. cit., pp. 29 and 150). A coercive rather than "executive" function is identified by Kalshoven, F., op. cit., p. 26; Paniagua, op. cit., p. 158; Zemanek, op. ult. cit., p. 35.

80/ Zoller, E., op. cit., pp. 46 ff. As well as the previously cited writers, Zoller (who addressed herself to the suspension of treaties as well as reprisals) believes that countermeasures are neither punitive-repressive nor directly reparatory (compensatory) or executive but exclusively coercive-reparatory in a broad sense. This would necessarily imply a temporary character of the measures which should cease to operate once their purpose has been attained. Zoller, E., op. cit., p. 54. Similarly De Guttry, A., op cit., pp. 266-268. Two authors who, in less recent times, particularly insisted on temporality as a condition for the legitimacy of measures adopted by way of reprisal are Strupp, K., op. cit., p. 568; and De La Brière, Y., op. cit., p. 271.

81/ Lamberti Zanardi, op cit., p. 312.

82/ Elagab, O.Y., op. cit., pp. 44-45.

44. While recognizing the diversity of purposes pursued by reprisals, Dominicé 83/ notes that "La doctrine des représailles a été marquée par l'idée qu'il s'agit d'un acte de vengeance, d'un châtiment, ce qu'elles furent sans doute autrefois. L'institution n'a pas entièrement perdu ce caractère, mais ce n'est plus son trait dominant. Elle doit être comprise dans le contexte de l'autoprotection et à la lumière de sa finalité première qui est la contrainte". 84/ The cited author holds however a very elastic concept of the functions of reprisals, such functions varying according to the circumstances, notably to the timing of the injured State's reaction and the attitude of the offending State. Thus, if the injured State reacts to a continuing violation, the measure's function will be to put a stop to the wrongful conduct and revert to compliance with the infringed obligation in which case the measure will be of a temporary, provisional character. 85/ If one reacts instead to a refusal to make reparation, the reprisal will have an executive or punitive purpose - and will acquire a final or definitive character. As regards their interaction with dispute settlement procedures, Dominicé seems to believe that reprisals may be aimed - depending on the phase in which the settlement commitments come into play - either at inducing implementation of the settlement procedure or at preserving, by interim measures, the chances to obtain the reparation provided for by the settlement which will eventually be achieved through the procedure resorted to.

45. In the presence of the distinctions proposed in the literature it will be necessary to analyse State practice in extent and depth. One must try to see whether and in what measure the legal régime of countermeasures is or should be diversified according to the function they may be intended to perform. It is perhaps likely - subject, however, to verification - that a diversification may appear to be particularly justified with regard to the impact of the prior claim to reparation, sommation, compliance with peaceful settlement obligations and proportionality.

83/ Dominicé, Ch., op. cit., pp. 34-35. For a similar approach, see Gianelli, A., op cit., p. 42. The indication of at least three different purposes of countermeasures (coercive, conservative/cautionary, executive) appears to be present also in Riphagen's Fourth Report, YBILC, Vol. II (Part One), 1983, paras. 102-106, pp. 20-21.

84/ Dominicé, Ch., op. cit., p. 55.

85/ Ibid., pp. 40 ff.

Chapter IV

The Issue of a Prior Claim of Reparation

46. Frequently evoked but rarely dealt with adequately is the question whether and to what extent lawful resort to reprisals should be preceded by intimations such as protest, demand of cessation and/or reparation, sommation or any other form of communication to the offending State on the part of the aggrieved State or States. 86/ Nevertheless, two main trends can be discerned, both related to the general theories on international responsibility.

47. The minority doctrine according to which reprisals are the primary and normal sanction of any internationally wrongful act - reparation being, in a sense, just a possible "secondary" consequence 87/ - seems to maintain, although not without exception, that lawful resort to reprisal is not subject to any intimation, claim or sommation of the kind indicated in the preceding paragraph. No demand of cessation or reparation would need to be addressed as a matter of law to the offending State before reprisals are put into effect. 88/

48. A different position is clearly taken by the classical theory of State responsibility by which reparation and cessation are seen as the principal consequences of an internationally wrongful act while reprisals are seen essentially (although not exclusively) as coercive means to obtain cessation and/or reparation. 89/ Under this theory it is therefore natural to assume

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86/ A valuable doctoral thesis on the subject has been presented in Rome University by Gianelli, A., under the title Adempimenti preventivi al ricorso a misure di reazione all'illecito internazionale, Rome University, 1990. The manuscript has been kindly made available to us by the author.

87/ Kelsen, H., op. cit., pp. 481 ff and 571-573; and Principles of International Law, II ed., New York 1966, pp. 18 ff. See also Morgenthau, "Théorie des sanctions internationales", in RDILC, 1935, pp. 474-503 and 809-836.

88/ Kelsen, H., Unrecht op. cit., pp. 571 ff. This not so recent theory held that since a demand for reparation or an injunction would even not be necessary in the most extreme cases, namely when the injured State decided to resort to war, this would a fortiori hold true in case of measures short of war. While adhering to Kelsen's theory, Guggenheim has subsequently maintained that the injured State would be under the obligation to "mettre le violateur en demeure avant de proceder à des représailles", Traité de Droit International, II, Genève, 1954, p. 64, note 2 and p. 85 note 5.

89/ See, for all, Anzilotti, D., Corso di diritto internazionale, I, Rome 1928, pp. 416 ff, specie pp. 445 ff; and Schoen, "Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen", in ZöRV, suppl. 2 in vol. X, Breslau 1917, pp. 141-142.

that acts of reprisals cannot, as a rule, be lawfully resorted to prior to an unsuccessful protest and demand for cessation and/or reparation. 90/

49. The essence of the latter position is also maintained by that part of the doctrine which professes a broader concept of both the substantive and the instrumental consequences of an internationally wrongful act. We refer to the doctrine according to which the consequences of an internationally wrongful act are not merely restitutive, compensatory or reparatory but retributive or punitive as well. The authors who so define the said consequences also share the classical view that whatever their function (compensatory, retributive or dual), reprisals may not lawfully be resorted to unless cessation/reparation has been demanded without success. 91/

50. The contemporary doctrine elaborates of course in different ways on the general trend, especially with regard to the conditions under which the said principle applies and with regard to the admissible exceptions. Wengler, for example, thinks that the aggrieved State could lawfully resort to reprisals without any preliminaries in case of dolus on the part of the law-breaking State. 92/ The view has also been expressed that no preliminaries are required for measures to be taken against a State responsible of an international crime. 93/ Others indicate an exception in the case of

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90/ In that sense, inter alios, and in addition to the authors cited in the preceding note, see Strupp, K., Das Völkerrechtliche Delikt, in Stier-Somlo, Handbuch der Völkerrechts, Vol. III, Stuttgart 1920, Bibliotheca Visseriana, Tomus Secundus, Leyden 1924, pp. 117-118; Fauchille, Traité de droit international public, I, 3eme partie, Paris 1926, p. 690; and Reitzer, La réparation comme conséquence de l'acte illicite en droit international, Paris 1938, p. 36, who, however, allows for the existence of one derogation in the case of the so-called exceptio non adimpleti contractus: a measure the adoption of which would not require a previous demand of reparation (ibid., pp. 91 ff).

91/ Oppenheim, L., op. cit., v. II, 7th ed., 1952, pp. 136 and 218; Ago, R., "Le délit international", Hague Rec., 1939-II, pp. 527 ff.; Morelli, G., Nozioni op. cit., p. 363; Cepelka, Les conséquences juridiques du délit en droit international contemporain, Prague 1965, pp. 42 ff.; Skubiszewski, K.J., op. cit., p. 753; Schachter, O., op. cit., p. 170. One could not neglect the conclusions recently reached, on the present matter, by the American Law Institute in its Restatement of the Law Third of 14 May 1986. The comment to paragraph 905, devoted to "unilateral remedies" states: "Counter-measures in response to a violation of an international obligation are ordinarily justified only when the accused State wholly denies the violation or its responsibilities for the violation; rejects or ignores requests to terminate the violation or pay compensation; or rejects or ignores proposals for negotiations or third-party resolution" (Restatement Third, op. cit., p. 381).

92/ Wengler, W., Völkerrecht, I, Berlin-Goett.-Heid. 1964, pp. 516-517.

93/ Graefrath, B., "Responsibility and Damages Caused", Hague Rec., 1984-II, p. 65, note 125.

an internationally wrongful act of a "continuing character" (draft Article 25 of Part One of the draft Articles), 94/ or in the case of economic measures. 95/ With regard to the latter it is assumed, presumably, that no preliminaries need to be complied with in case of such (supposedly milder) forms of coercion. The rules proposed by our predecessor professor Riphagen, envisage a special régime for the case of synallagmatic obligations. Articles 8 and 10, in fact, do not even envisage an obligation of prior resort to (available) settlement procedures in the case where the injured State resorts to a non-compliance measure "by way of reciprocity" instead of "[by way of] reprisal". 96/ More systematically it has been suggested, in a recent contribution to the subject, that the question whether "a prior demand is a condition of lawful resort to reprisal depends upon the concrete circumstances of the violation and the nature of the obligation breached". 97/ The injured State would be relieved from the duty in question, for example, whenever the measure resorted to consisted in an application of the inadimplenti non est adimplendum principle and were taken by way of reaction to particularly serious violations. 98/

51. International practice should advise us more reliably with regard to the effective juridical relevance of a prior demand of reparation. Only on such a basis would it be possible to see how far a provision making of such a demand a condition of lawful resort to any measures would be a matter of mere codification or a matter of desirable progressive development. The study of practice should in particular tell us more than seems to emerge from the literature with regard to the frequently mentioned sommation: namely, whether this is a condition sine qua non of any measure, or a requirement of resort to given kinds of measures, the lawfulness of other kinds of reactions being subject to less strict conditions. In particular, one might hopefully draw from the said analysis less vague indications with regard to the identification of the measures the nature of which would exempt the injured State from the requirement of sommation. One might be in a position better to determine whether sommation should be not required for any relatively "bland" measures in general or the so-called "reciprocity" measures, or only for measures intended to perform an interim protective function; or whether the question would totally or partly depend upon the degree of urgency of the remedy or upon the gravity of the wrongful act. Were the practice to indicate that this area is not covered satisfactorily de lege lata, improvement might have to be sought, especially in order better to protect prospective weaker parties, as a matter of progressive development.

94/ Pueyo Losa, El derecho a las represalias en tiempo de paz: condiciones de ejercicio, Rev. esp. de D.I., 1988-XI, pp. 29-30.

95/ Zoller, E., Quelques reflexions, op. cit., p. 379.

96/ For the text of these Articles, see YBILC 1985, Vol. II, (Part One), pp. 10-12.

97/ Lattanzi, F., "Sanzioni internazionali", in Enc. del Diritto, XLI vol., p. 542.

98/ Ibid., p. 544. This author develops in substance within the framework of contemporary international law, the position formerly taken by Reitzer, who indicated, as exceptions to the obligation of a previous demand of reparation, the cases of non adimpleti contractus and that of défense légitime (see op. cit., pp. 80 ff.).

Chapter V

The Impact of Dispute Settlement Obligations

52. Interrelated with the requirement of a prior demand of reparation (sommation) is the question of the impact of any existing obligations of the injured State with regard to dispute settlement procedures. In some measure, indeed, the existence of any such obligations - and the injured State's prior compliance therewith - is quite likely to condition the lawfulness of resort to any unilateral remedies or given kinds thereof. A legal duty of the said State to resort to given means of settlement would then operate as another limitation of its faculté to resort to unilateral measures: and the recognition of such a restriction - de lege lata or de lege ferenda - would be a not negligible step towards the reduction of the undesirable consequences of the unilateral determination and enforcement of the right to reparation in a broad sense in such an inorganic milieu as the "society of States". Of course, the attempts in that direction have primarily been aimed so far at the objective of curbing arbitrary resort to armed force, whether for the implementation of alleged rights (legal disputes) or of mere interests (political disputes). Nevertheless, the matter has been rightly recognized to be of great importance for the legal control of resort to non-forcible measures as well. Although less dramatic and harmful, such measures can be equally detrimental to the preservation of friendly relations and the development of cooperation among States.

53. It is of course unnecessary to recall here the various steps of the development of peaceful settlement procedures which has led to the present, relatively more advanced stage of this vital chapter of international law. Suffice it to recall that the most important general step - probably embodied by now in a rule of general international law - is represented by the principle embodied in Article 2, paragraph 3 (obviously interrelated with Article 2, paragraph 4) of the United Nations Charter and by the more specific but still very general provisions of Article 33 of that same instrument. It is mainly on those provisions, obviously combined with the concrete settlement obligations deriving from bilateral or multilateral commitments of a more specific nature (only the most advanced of which are those deriving from the Statute of the ICJ and the various instruments connected with Article 36 thereof), that are based such important reiterations of the Charter rules as the not very satisfactory Friendly Relations formulation of the principle of peaceful settlement and the less disappointing, although very general, Manila Declaration.

54. A part of the doctrine is inclined to believe that the cited Charter principles and rules (as presumably reflected in general international law) make it unlawful for any injured State to resort to countermeasures prior to:

(i) the presentation of appropriate demands to the allegedly law-breaking State, as considered above; and

(ii) the bona fide experiment of the peaceful settlement procedures indicated in Article 33 of the Charter. 99/

Another part of the doctrine understands instead the second of the above requirements as applying only to measures involving force. This in view of the fact that only this kind of measures would be susceptible of endangering international peace and security. 100/ Measures short of force (force being mostly understood as military force) could thus lawfully be resorted to even without a prior compliance with the said requirement.

55. Be it as it may of the impact of the general rules on peaceful settlement, the question becomes more complex in the presence of dispute settlement obligations which may exist between injured State and law-breaking State by virtue of subjectively and objectively specific instruments (bilateral or multilateral, inorganic or institutional) to which the said States may be parties at the relevant time. We refer not only to the dispute settlement obligations and rights arising from instruments like special agreements (compromis), compromissory clauses, general arbitration or judicial settlement treaties or declarations of acceptance of the jurisdiction of the International Court of Justice under the so-called optional clause (Article 36, paragraph 2 of the Court's Statute) but also to the statutes of a number of international institutions and to the multilateral instruments covering specific areas. A number of authors believe that at least the commitments deriving from such more specific instruments do have a decisive impact - under given conditions - on the lawfulness of measures to be taken. In given hypotheses, in other words, the prior experiment of one or more of the envisaged procedures would be a condition of lawful resort to measures. 101/

99/ Opinions anticipating this view had already been expressed by a number of participants in the travaux préparatoires of the cited IDI 1934 resolution, among them Politis, Barclay, and De La Brière (Ann. IDI, Vol. 38, 1934, pp. 40-41, 90, 95). In the more recent literature, see Zourek, La notion, op. cit., p. 60; Bowett, "Economic Coercion and Reprisals by States", in Virg. J.I.L. 1972, Vol. 13 (I), p. 10; Cassese, Il diritto internazionale nel mondo contemporaneo, Bologna, 1984, p. 270; Pueyo Losa, op. cit., p. 21; De Guttry, op. cit., pp. 227-237.

100/ Fisler Damrosch, op. cit., pp. 805 ff.; Zemanek, "The Unilateral Enforcement of International Obligations", in ZaöRV 1987 (47), p. 37; Lattanzi, Sanzioni, op. cit., pp. 543-544; and less decidedly Zoller, Peacetime, op. cit., pp.120-121.

101/ In this sense already expressed themselves Reitzer, op. cit., pp. 4-35; and Dumbauld, Interim Measures of Protection in International Controversies, The Hague, 1932, pp. 182 ff. More recently, Bowett, Economic Coercion, op. cit., p. 11 and "Economic Coercion (Past and Present). International Law and Economic Coercion", Virg. JIL, 1976 Vol. 16 (II), p. 248; Ago in his Comment to Article 30 of Part One of the project on State Responsibility in YBILC 1979, Vol. II, (Part One), note 191; Malanczuk, op. cit., p. 739; Lattanzi, Sanzioni, op. cit., p. 544 (who excludes, however, the hypothesis of inadimplenti non est adimplendum and of measures against international crimes).

56. Less restrictive of the injured State's discretionary choice seems to be Article 5 of the resolution of the International Law Institute of 1934 according to which "Les représailles même non armées sont interdites quand le respect du droit peut être effectivement assuré par des procédures de règlement pacifique. En conséquence, elles doivent être considérées comme interdites notamment: (1) Lorsqu'en vertu du droit en vigeur entre les parties, l'acte dénoncé comme illicite est de la compétence obligatoire de juges ou d'arbitres ayant compétence aussi pour ordonner, avec la diligence voulue, des mesures provisoires ou conservatoires et que l'Etat défendeur ne cherche pas à éluder cette juridiction ou à en retarder le fonctionnement; (2) Lorsqu'une procédure de règlement pacifique est en cours, dans les conditions envisagées au (1), à moins que les représailles n'aient légitimement été prises auparavant, réserve faite de leur cessation décidée par l'autorité saisie". 102/ The condition that the legally available procedure be of such nature as effectively to ensure respect of the injured State's rights is deemed to be indispensable by the majority of the authors who dealt with the matter. 103/ Some writers, for example, believe that the mere existence (in a general treaty or in a compromissory clause) of an obligation to go to arbitration by an ad hoc agreement (such obligation being merely a pactum de contrahendo) would not be sufficient to preclude resort to measures. The reprisals resorted to, however, should either have a merely provisional (interim measures) function or be intended to coerce the allegedly law-breaking State to conclude the ad hoc agreement. 104/ While believing, on the other hand, that the existence between the parties of a really compulsory jurisdiction - namely a jurisdictional link allowing the allegedly injured State to start arbitral or judicial proceedings by unilateral application - would normally foreclose direct resort to measures, the same scholars think that no obstacle would even in such a case exist to resort to unilateral interim measures unless where the competent body had no power to issue an order for interim measures or where such an order were not complied with by the allegedly law-breaking State. 105/

57. At the side of the nature, availability and degree of effectiveness of a possibly relevant settlement procedure, one must thus take account, according to a part of the literature, of the aim pursued by the measures envisaged or resorted to by the injured State: a matter recently explored

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102/ Ann. IDI, Vol. 38, 1934, p. 709.

103/ According to Elagab "if it transpires that there is in reality a definite commitment to peaceful settlement between the parties concerned, resort to countermeasures by either party must be considered as prima facie unlawful. This general rule applies particularly where the treaty containing that rule establishes mechanisms for ensuring its implementation. There may, however, be situations in which the desired mechanisms prove inadequate. It is here that an aggrieved State could justifiably resort to countermeasures on the basis of customary law." (op. cit., p.183).

104/ Dominicé, Observations, op. cit., pp. 44 ff.; Zoller, Peacetime, op. cit., pp. 120-122; Fisler Damrosch, op. cit., pp. 805 ff.; De Guttry, op. cit., pp. 243-245.

105/ Dominicé, Observations, op. cit., pp. 48-56; Zoller, Peacetime, op. cit., pp. 122-124; Fisler Damrosch, op. cit., pp. 805 ff.; De Guttry, op. cit., pp. 246-256.

by Dominicé. 106/ According to this scholar, one must distinguish reprisals aimed at securing reparation from reprisals which, by way of reaction to a continuing wrongful act, also pursue, by cessation, compliance with the obligation which is being infringed. A prior sommation, together with an arbitration proposal, would be a condition of resort to reprisals in the former case only. Resort to reprisals would be lawful in such a case, only where the arbitration proposal - and, of course, sommation - had been of no avail. In the case where the wrongful conduct was still in progress, provisional measures or measures intended to induce cessation and/or arbitration should lawfully be resorted to immediately regardless of settlement procedure commitments. In any case, measures taken by the injured State following non-compliance by the law-breaking State with an arbitral decision, would also be lawful. 107/

58. Particular attention is paid to the provisional, protective nature of the measures and to the effectiveness of the competent power of the bodies in Professor Riphagen's draft Article 10. According to the first paragraph of that Article no measure (other than a "reciprocity" measure of the kind contemplated in our predecessor's draft Article 8) could be resorted to by the injured State "until it has exhausted the international procedures for peaceful settlement of the dispute available to it". The second paragraph, however, exempts from the prohibition "(a) interim measures of protection taken by the injured State within its jurisdiction, until a competent international court or tribunal, under the applicable international procedure for peaceful settlement of the dispute, has decided on the admissibility of such interim measures of protection; (b) measures taken by the injured State if the State alleged to have committed the internationally wrongful act fails to comply with an interim measure of protection ordered by such international court or tribunal". 108/ It remains to be seen whether this provision is wholly satisfactory.

106/ Dominicé, Observations, op. cit., pp. 33 ff.

107/ In the same sense, Pueyo Losa, op. cit., pp. 27 ff. Also Elagab recently stresses the necessity to take account of the different motivations behind the measures taken (op. cit., pp. 183 ff.).

108/ A further element of the present summary review of the doctrinal positions on the subject is the Restatement of the Law Third of the American Law Institute. The text of paragraph 905 devoted to unilateral remedies does not, in fact, address itself expressly to the relationship between measures on one side, and dispute settlement obligations, on the other side (Restatement, op. cit., p. 380). The relevant comment, however, states that for resort to measures to be lawful it would be necessary, inter alia, that "the accused State ... rejects or ignores proposals for negotiation or third party resolution". Reference is made, on the other hand, not to possible bilateral settlement instruments in force between the parties but only to settlement procedures available within the framework of international organizations; "In a dispute between members of an international organization, there may be a requirement that the dispute be submitted to the dispute settlement procedures of the organization, and countermeasures are precluded before that procedure has been concluded or terminated without success" (ibid., p. 381). In the "Reporter's notes" one further reads that the lawfulness of countermeasures "disappears, however, once the case has been submitted to an international tribunal, and the tribunal is in a position to decide on interim measures of protection" (ibid., p. 387).

59. Here again, an adequate study of international practice - starting from an articulate classification of dispute settlement instruments from the viewpoint of their respective degrees of strictness and effectiveness - is indispensable before choosing the best possible solutions. And here again the search should be conducted with the dual purpose of assessing lex lata with the utmost precision and devising the improvements which might reasonably be proposed for the law of unilateral countermeasures to be more advanced in the interest of justice (see para. 4 above).

60. Indeed, it will be surely difficult that States accept in the envisaged Part Three of the draft Articles, really significant innovations with regard to the settlement of disputes on the interpretation and application of the rules of the proposed Convention on State Responsibility. Considering that the impact of such rules would extend to any area of international law - namely to the violation of any primary norms or principles of written or unwritten international law and the consequences thereof - any binding settlement commitments eventually accepted by States under the said Part Three would extend to the whole area of their relationships which may give rise to controversy. A clear reflection of such difficulties is to be found in the scarcity of binding settlement commitments envisaged in draft Articles 1-5 of Part Three of the project as proposed by our predecessor, Professor Riphagen, 109/ and in the great caution manifested by the members of the Commission in the debate over those provisions. 110/

61. While not excluding the possibility that more significant steps be taken with regard to the content of the said Part Three, another matter, surely, are the rules to be worked out by the Commission with regard to the impact of dispute settlement commitments upon the lawfulness of unilateral reactions to internationally wrongful acts. In that respect the present Special Rapporteur is inclined to believe that more could and should be done - once the existing situation were adequately determined - in order to protect by adequate rules any party in a State responsibility relationship which had accepted dispute settlement commitments and was ready to comply therewith. Any rules of that kind would concur, at one and the same time, to reduce arbitrary resort to measures by the arrogant and to promote, together with the just solution of any controversy arising from any specific internationally wrongful act, the conclusion by States of effective bilateral or multilateral instruments of dispute settlement in increasingly broader areas.

62. It is on the basis of such considerations that one should try to answer questions such as: - whether under Charter Article 2, paragraph 3 and the provisions of Article 33 no measures should be resorted to by an injured State before resorting to one or more of the means listed in the latter article; - whether there are any measures an injured State would or should be entitled to resort to without waiting for an unsuccessful attempt to use any such means of settlement: for example, interim measures or measures intended to induce the counterpart to comply with any settlement obligations; - whether and under what conditions, in particular, the fact that a settlement or quasi-settlement procedure had attained a given stage of progress would restrict the faculté of resort to given measures.

109/ See Riphagen's Seventh Report, YBILC, 1986, Vol. II, (Part One) pp. 2-3

110/ See the relevant summary records in YBILC, 1986, Vol. I, pp. 56-78.

Chapter VI

The Problem of Proportionality

63. One of the most crucial aspects of countermeasures is the question of proportionality. A rule of proportionality has surely assumed a stricter and more precise content during the part of the present century which has followed the First World War: a development concomitant with the condemnation of the use of force. Nevertheless, the notion of proportionality was already present more or less explicitly in the seventeenth, eighteenth and nineteenth century doctrine. It was clearly implied in the doctrinal position taken, for example, by Grotius, Vattel and Phillimore, that goods seized by way of reprisal were lawfully appropriated by the injured sovereign, "so far as is necessary to satisfy the original debt that caused, and the expenses incurred by the Reprisal; the residue is to be returned to the Government of the subjects against whom reprisals have been put in force". 111/

64. Most twentieth century authors are of the opinion that a State resorting to reprisals should adhere to the principle of proportionality. Oppenheim holds that "[r]eprisals, be they positive or negative, must be in proportion to the wrong done, and to the amount of compulsion necessary to get reparation". 112/ In Guggenheim's words "[d]as moderne Völkerrecht weist sodann eine Verpflichtung zur Proportionalität der Repressalie auf". 113/ Overcoming the doubts expressed by Anzilotti in the twenties and Strupp in the thirties 114/ the rest of the doctrine seems unanimous in considering proportionality as a hard and fast rule of international law. Among the distinguished authors who recognize the principle of proportionality as a general requirement for the legitimacy of reprisals, are Bourquin, 115/

111/ Sir Robert Phillimore, Commentaries upon International Law, Vol. III, London, 1885, p. 32; Adde: Hugo Grotius, De Jure Belli Ac Pacis Libri Tres, Book III, Chapter 2 s., viii 3, The Classics of International Law, International Peace, Division of International Law, J.B. Scott ed., Washington, 1925, p. 629; and E. De Vattel, The Law of Nations: or, Principles of the Law of Nature, applied to the conduct and Affairs of Nations and Sovereigns, Book Two, Chapter XVIII 342, J. Chitty ed., London, 1834, p. 283.

112/ L. Oppenheim, International Law, Vol. II, op. cit., 1955, p. 141.

113/ Guggenheim, P., op. cit., p. 585.

114/ The former considered the rule of proportionality merely as a moral norm (Anzilotti, D., op. cit., pp. 167); Strupp, K., did not believe in the existence of rules establishing proportions which had to be observed in the exercise of reprisals (op. cit., pp. 568-569).

115/ Bourquin, op. cit., p. 223.

Kelsen , 116/ Morelli, 117/ Wengler, 118/ Schachter, 119/ Reuter, 120/ Brownlie, 121/ Tomuschat, 122/ Skubiszewski, 123/ Giuliano, Scovazzi and Treves, 124/ Graefrath and Steiniger, 125/ and Bowett. 126/

65. There is no uniformity, however - either in the practice or the doctrine - with regard to the exact concept of proportionality. A difference can be detected, for example, between the doctrine based upon the well known jurisprudential dictum on the Naulilaa Case and the International Law Institute's definition. The first held that "même si l'on admettait que le droit des gens n'exige pas que la représaille se mesure approximativement à l'offense, on devrait certainement considérer comme excessives et partant illicites, des représailles hors de toute proportion avec l'acte qui les a motivées". 127/ More severely, the International Law Institute seems to

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116/ Hans Kelsen, Principles of International law, op. cit., p. 21.

117/ Morelli, G., op. cit., p. 262.

118/ Wengler, W., op. cit., p. 21.

119/ Schachter, O., op. cit., p. 178.

120/ Reuter, P., op. cit., p. 463.

121/ Brownlie, I., International Law and the Use of Force by States, Oxford, 1983, p. 219.

122/ Tomuschat, Ch., Repressalie und Retorsion, Zu einige Aspekten ihrer innerstaatlichen Durchfurung, ZaöRV, Vol. 33, 1973, pp. 179-222, p. 192.

123/ Skubiszewski, K.J., op. cit., pp. 753-4.

124/ Giuliano, Scovazzi and Treves, op. cit., p. 597.

125/ Graefrath, B. und Steiniger, P., Kodification der völkerrechtlichen Verantwortlichkeit, 27 Neue Justiz, 1973, pp. 225-28, Article 9 2, p. 228.

126/ Bowett, D., Virg. JIL, 1972, op. cit., p. 10.

127/ Unriaa, II, p. 1028. It will be recalled that Germany had destroyed, on that occasion, six Portugese military posts in Angola in response to the killing of two German officers and an official in the Portugese fortified place of Naulilaa. The Tribunal rejected the German contention that its action had been justified as a reprisal, on these accounts: - first because the death of the German personnel could not be considered as an unlawful act of the Portugese authorities; second, because the German reaction had not been preceded by any "sommation préalable"; finally, because there had been no "proportion admissible entre l'offense alléguée et les représailles exercées." Ibid., p. 1028.

require that the measure be proportional to the gravity of the offence and of the damage suffered. 128/ A less strict concept seems to emerge from the pronouncement of the scholars from whom emanated the Air Services award, 129/ according to which "[i]t is generally agreed that all countermeasures must, in the first instance, have some degree of equivalence with the alleged breach" and "[i]t has been observed, generally, that judging the 'proportionality' of countermeasures is not an easy task and can be at best be accomplished by approximation". On this basis the arbitrators had concluded that "[t]he measures taken by the United States do not appear to be clearly disproportionate when compared to those taken by France". 130/

66. According to our distinguished predecessor's formulation of paragraph 2 of Article 9, "the exercise of the right (of injured States) shall not, in its effects, be manifestly disproportionate to the seriousness of the act". 131/

128/ According to the resolution of 1934, the acting State must "proportionner la contrainte employée à la gravité de l'acte dénoncé comme illicite et à l'importance du dommage subi", (Article 6, paragraph 2, in Ann. IDI 1934, Vol. 38, p. 709).

129/ Case Concerning the Air Services Agreement of 27 March 1946, Digest of U.S. Practice of International Law, 1978, p. 779. The award can also be read in ILR, Vol. 54, p. 338 ff.

130/ Digest of U.S. Practice in International Law, 1978, p. 779, ILR, Vol. 54, 1979, esp. pp. 319 ff.

131/ YBILC, Vol. II, (Part One) 1985, p. 11. Not quite clearly, Riphagen distinguishes a qualitative and a quantitative disproportion. Under the first, a measure would be justified only where the breach committed by way of countermeasure responds to an internationally wrongful act consisting in the violation of the same obligation or of an obligation of the same kind or - if we understand correctly, of an obligation closely connected with the infringed obligation. According to the cited scholar, this hypothesis would be characterized by the coming into play of the concept of "self-protection" and the nature of the wrongful act and of the rights of the offending State: "Within the framework of qualitative proportionality, the admissibility of measures of self-help is obviously the most dubious, since such measures necessarily involve an infringement of rights of the author State. Accordingly, reprisals are generally considered as allowed only in limited forms and in limited cases. The nature of internationally wrongful acts and the nature of the rights of the author State infringed by the reprisal are relevant here." (Fourth Report, op. cit., para. 80, p. 15). More simply, quantitative proportionality would be the proportionality of the damages (injuries) caused to the offending State by the measure to the damages (injuries) suffered by the acting State. According to Riphagen himself, however, the two kinds of proportionality would not be separable; they would be two sides, so to speak, of the same coin (Preliminary Report, YBILC 1980, Vol. II, (Part One) Doc. A/CN.4/330, paras. 94-95).

A similar concept seems to be set forth in the cited Restatement Third, Article 905 paragraph 1 (b), according to which an injured State "may resort to countermeasures that might otherwise be unlawful, if such measures ... (b) are not out of proportion to the violation and the injury suffered". 132/

67. Another issue emerging from the literature is whether proportionality is required with reference: to the wrongful act per se, to the effects thereof, to the specific - mediate or intermediate - aim of the measure, or to any two or more of such elements together. While reference of proportionality to the violation (namely to the importance of the breached rule and of the breach) is very frequent, 133/ also frequent is reference to the damage or injury caused by the breach. 134/ Reference is also made in the literature to the aims in view of which countermeasures are taken. The question would be to know whether the aims pursued by the injured State's measures are or not relevant, together with the nature and gravity of the breach and the effects thereof, for the purpose of determining the presence or absence of proportionality. 135/ Some authors seem indeed to connect proportionality both to the injury suffered and the aim pursued while keeping the two elements separate. Skubiszewski, for example, asserts that reprisals must be "proportionate to the injury suffered" adding however that they must not involve "the application of compulsion in an amount that goes beyond what would be necessary to secure a settlement". 136/ According to McDougal (who presumably had in mind, however,

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132/ Restatement of the Law Third, op. cit., para. 905 (b). Of the same opinion seem to be Alland, op. cit., p. 184; Malanczuk, op. cit., p. 214; Conforti, B., op. cit., p. 360; Cassese, op. cit., p. 271. Proportionality, in our view, should be connected with the degree of fault (dolus or culpa in a narrow sense) by which the wrongful act is characterized.

133/ In this respect the Arbitral Award in the Naulilaa case has been of influence. In that award the notion of proportionality was linked to "l'acte qui ... a motivé[es]" the reprisals, UNRIAA, II, p. 1028. In the doctrine this is also by Guggenheim, P., op. cit., p. 585-586; Kelsen, H., Principles of International Law, op. cit., p. 21; and Kapoor, S.K., A Textbook of International Law, Allahabad, 1985, p. 625; Sereni, Diritto Internazionale, III, p. 1559.

134/ Reference to proportionality not only in regard to the damage suffered, inter alios, Venezia, J.C., op. cit., p. 476; De Guttry, A., op. cit., p. 263; Elagab, O.Y., op. cit.; p. 94, Fisler Damrosch, L., op. cit., p. 792; Zemanek, K., Unilateral Enforcement, op. cit., p. 87; and the Two Special Rapporteurs Ago (in YBILC, 1979, Vol. II (Part One), para. 82) and Riphagen (in his draft Article 9, paragraph 2). To the breach and the damage suffered seems to refer itself the resolution of the International Law Institute of 1934 quoted supra, para. 65.

135/ On the relevance of these aims: De Guttry, A., op. cit., pp. 263-64; Dominicé, Ch., Observations, op. cit., pp. 64-66; Elagab, O.Y., op. cit., pp. 86 ff.

136/ In Manual of International Law (Sørensen ed.), p. 753.

violent reprisals) "[i]t may be suggested ... that if reprisals are to signify something more than an adventitious 'survival of lex talionis', they should be adapted and related not so much to the past illegality but rather and primarily to the future purpose sought. It is a common emphasis that the legitimate purpose of reprisals is not the infliction of retribution but the deterrence of future unlawfulness. From such emphasis it would seem to follow that the kind and amount of permissible reprisal violence is that which is reasonably designed so to affect the enemy's expectation about the costs and gains of reiteration or continuation of its initial unlawful act as to induce the termination of and future abstention from such act. The quantum of permissible reprisal violence, so determined, may under certain circumstances, conceivably be greater than that inflicted in the enemy's original unlawful act". 137/

68. The noted differences advise us to consider State practice and international jurisprudence with the utmost care in order to choose the most suitable formulation of the law. One should determine, in particular, if proportionality should be required not only for the measures qualifying as reprisals stricto sensu, but also for the so-called reciprocity measures; - whether the latter are subject instead to such stricter requirements as identity or equivalence or whether they do not really differ from other reprisals except for the fact that they are more perfectly proportional, so to speak, to the gravity of the wrongful act and of the injury caused. One must further determine, in the light of a thorough analysis of practice, whether the requirement of proportionality should be formulated in broader or stricter terms and in connection with which elements: injury suffered, importance of the infringed rule, aim of the measure resorted to, or any combination of two or more of such elements. More satisfactory and articulate formulations could perhaps be found than those registered under paragraphs 65 and 66 above.

137/ Law and Minimum World Public Order, 1967, pp. 682-683.

Chapter VII

The Régime of Suspension and Termination of Treaties as Countermeasures

69. A controversial matter is whether the legal régime of countermeasures - particularly with regard to prior demand of reparation, impact of dispute settlement obligations and proportionality - should undergo any adaptations where the measures resorted to consisted in the termination or suspension of a treaty or of any portion thereof. But before considering the distinct features that a part of the doctrine seems to identify in the régime of this particular kind of measures, a few remarks of a general nature seem to be appropriate.

70. Suspension and termination are mainly dealt with, in the literature of international law, as a part of the law of treaties and under the implied or explicit inspiration of well-known national law rules on suspension and termination of contracts. 138/ Within the said framework of the law of treaties, suspension and termination are notably dealt with as vicissitudes in the life of a treaty, 139/ such vicissitudes obviously including the consequences of non-compliance. It is within that context that doctrine and jurisprudence have worked out, around suspension and termination, rules concerning: (a) the kinds of treaty breaches that could justify suspension or termination; (b) the conditions in the presence of which a treaty could be suspended or terminated totally or in part; (c) the requirements to be complied with by the injured State lawfully to proceed to suspension or termination. And it is by way of codification and/or progressive development of the rules of general international law covering such matters that the Vienna Conference on the Law of Treaties adopted Article 60 of the 1969 Convention and the auxiliary provisions embodied in Articles 65-67, 70 and 72 of that Convention.

71. A different matter, however, are the rules of general international law concerning suspension and termination of treaties as unilateral measures available to the injured State in response to any internationally

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138/ Both remedies are envisaged, in the literature and practice of private law, as typical of legal relationships circumscribed to the sphere of a contract.

139/ In a manner pretty similar, therefore, to the manner in which the more or less analogous vicissitudes of contracts are envisaged in private national law.

wrongful act. This subject, expressly not prejudged, as stated in Article 73 of the Vienna Convention, 140/ by Article 60 of that Convention (and by the cited accessory provisions of the same instrument), is a much broader one. It reaches not only beyond the vicissitudes of a given, single treaty (as in the case of the cited Article 60) but beyond the sphere of treaty law altogether. 141/

72. Indeed, the cited Article 60, the only one that is of interest in the present context, contemplates suspension and termination of a given treaty, only as possible reactions, on the part of the contracting States or any one of them, to a breach - and a material breach for that matter - of one or more rules of that same treaty. The legal régime of suspension and termination of treaties within the framework of the instrumental consequences of an internationally wrongful act covers or should cover instead (de lege lata or de lege ferenda) such hypotheses of resort to these measures as: (i) suspension or termination of a treaty (or any rule or part thereof) in response to an infringement of one or more of the obligations deriving from the same treaty; (ii) but, far beyond that area (which is roughly the area covered by Article 60), suspension or termination of a treaty (or any rule or part thereof) in response to a breach of any other treaty or treaties;

140/ Article 73 reads: "The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States". One should also consider, of course, the explanation of the exclusion of State responsibility from the Vienna Convention régime (as a whole) given by the Commission itself prior to the very adoption of Article 73: "The draft Articles do not contain provisions concerning the question of the international responsibility of the State with respect to a failure to perform a treaty obligation. This question - stated the Commission in its 1964 Report - would involve not only the general principles governing reparation to be made for a breach of a treaty, but also the grounds which may be invoked in justification for the non-performance of a treaty. As these matters form part of the general topic of the international responsibility of States, which is to be the subject of separate examination by the Commission, it decided to exclude them in connection with its study of international responsibility of States". YBILC 1966, Vol. II, p. 117. See on this point Rosenne, S., Breach of Treaty, Cambridge, 1985, pp. 3-5, and "Vienna Convention on the Law of Treaties", in Enc. of Pub. Int. Law, Vol. VII, pp. 525 ff.

141/ Accordingly, this interpretation of the relationship between the law of treaties and the law of State responsibility, has recently been supported by the Arbitral Tribunal in the decision of the Rainbow Warrior Case between New Zealand and France. See paras. 73 ff. of the Award and the comment by Palmisano, G., Sulla decisione arbitrale relativa alla seconda fase del caso "Rainbow Warrior", in Riv. Dir. Int., 1990, Nr. 4, pp. 885-889. For a different interpretation of the said relationship see Bowett, D., "Treaty and State Responsibility", in Mélange Virally, Paris, 1991.

and (iii) suspension or termination of a treaty (or any rule or portion thereof) in response to a breach of a rule of general international law, whether an ordinary customary rule or principle or a peremptory rule.

73. It is well known that the interpretation of Article 60 is not uncontroversial. It is also controversial whether and to what extent the content of that Article coincides with the existing general law on suspension and termination of treaties. 142/ Be it as it may of such issues, the provision set forth in Article 60 can in no way be considered to exhaust the legal régime of suspension and termination for the purposes of the general régime of State responsibility. More precisely, the provisions of Articles 60 exhaust: (i) neither the régime of all the measures that can be resorted to in connection with a breach of a given treaty; (ii) nor the régime of the various measures (suspension and termination included) which may be resorted to in connection with the infringement of any obligation arising from any rule of international law, whether created by treaty or by custom.

74. It follows that the legal régime of suspension and termination of treaties must first of all be studied in the light of the rules and principles tentatively explored so far with regard to countermeasures in general. 143/

142/ The coincidence may result either from the fact that the content of Article 60 constitutes a mere translation into written form of the existing general law of the matter or from the fact that the content of the relevant part of general international law got at some later stage to reflect (and then to conform with) the régime embodied in Article 60. The question (which we leave open for the present time) is a rather controversial one.

143/ Even when they are resorted to following a violation of treaty rights, suspension and termination are just two of the forms of remedial action available to the injured State. See on this point Cavaglieri: "Parmi les causes qui ne determinent pas directement ipso iure, l'extinction d'un traité mais réalisent cet effet dans la mesure où l'Etat intéressé invoque son droit à l'abrogation du traité, il y a sans aucun doute, à notre avis, l'inexécution par une des parties d'une ou de plusieurs dispositions du traité même. Cette inexécution n'entraine pas nécessairement, automatiquement, la disparition du traité. Celui-ci, malgré l'inexécution plus ou moins grave de la part de l'un des contractants, garde toute sa vigueur, produit tous ses effets. L'autre partie peut, en présence de cette infraction, choisir la voie qu'elle croit la plus conforme à son intéret. Elle peut tolérer l'inexécution sans aucun réaction de sa part: ou exiger que le traité soit régulièrement exécuté et demander à l'Etat coupable la réparation des dommages souffert; ou méconnaitre à son tour, à titre de réciprocité, la règle violée. Mais l'inexécution du traité l'autorise également à se considerer comme dégagée de ses obligations, à déclarer qu'elle n'est plus liée par aucune clause de ce traité." Règles du droit de la paix, in Hague Rec., 1929, p. 534; Sereni, Diritto internazionale, III Milano 1962, p. 1479; Sinha, Unilateral Denunciation of Treaty Because of Prior Violations of Obligations by Other Party, The Hague 1966, p. 206; Guggenheim, Traité, Vol. I, op. cit., p. 219 ff.; Morelli, op. cit., p. 327; Jimenez de Aréchaga, "International Law in the Past Third of a Century", Hague Rec., 1978-I, p. 79; Dominicé, Observations, op. cit., p. 28.

We refer to such rules as those concerning the substantive and procedural requirements, conditions, limitations and modalities of countermeasures: namely, the obligations or onera to be satisfied by the injured State prior to resort to measures; and the requirement of proportionality. It must notably be determined whether the particular features of suspension and termination affect in any measure - and eventually in what sense - their subjection to the conditions and requirements to be fulfilled for any other countermeasure to be lawfully taken, particularly as regards sommation and dispute settlement obligations.

75. The very first question that arises is whether suspension and termination may be resorted to by way of reaction to any kind of internationally wrongful act or only in case of unlawful acts of a certain kind. It is known that in this regard a distinction is generally made within the framework of the law of treaties. While termination would be admissible only in the presence of a material violation of the (same) treaty, 144/ suspension would also be admissible - in general international law - in case of minor violations. Article 60 of the Vienna Convention is generally considered to have opted for a more restrictive régime of suspension as well as termination - namely for the requirement in both cases of a material breach - in order to safeguard the continuity and stability of the treaty. 145/ Under the law of treaties - at least as set forth in the cited Article 60 - minor violations should not bring about either termination or suspension.

76. A choice will have to be made at that point between two ways in which the said restrictions would be called to operate. One possibility would be that, within the wider perspective of the law of State responsibility, those restrictions be envisaged as specific, particular rules applicable to the suspension and termination of treaties. Another possibility is that the restrictions in question be envisaged merely as the result of the operation, with regard to suspension and termination, of the rules or principles governing countermeasures in general, regardless of the conventional framework within which the two said remedies apply. The same problem arises for the questions, so familiar to those who study the international law of treaties, under the labels of "qualitative proportionality" and "separability" of the provisions to be suspended or terminated.

144/ See in this sense the opinion of the PCIJ in the Eastern Carelia Case (PCIJ, Series C, No. 3/11, pp. 150-151) and the opinion of the arbitrator in the Tacna-Arica case (AJIL 1925, p. 415). For the doctrine, see Hall, A Treatise on International Law, Oxford, 1924, p. 409; McNair, The Law of Treaties, op. cit., p. 571; Simma (Reflections, op. cit., p. 31); Guggenheim (Traité, op. cit., p. 226); Oppenheim, International Law, op. cit., Vol. I, p. 947.

145/ Capotorti, "L'extinction et la suspension des traités", Hague Rec. 1971-III, p. 553.

77. With regard to the first question its typical sphere of application is represented precisely by the context of suspension or termination of a treaty in response to a violation of the same treaty. According to Simma, for instance, while qualitative proportionality - or proportionality "in kind" - would not be required by international law for measures, so to speak, of common reprisals, it would instead be an indispensable feature of lawfulness of suspension or termination within the framework of the law of treaties. 146/ In a similar sense expresses herself Forlati. 147/ The concept of qualitative proportionality (or, which amounts to the same, the concept of suspension or termination by way of reciprocity) leads thus the majority of writers on the law of treaties to assert that whenever the infringed part of the treaty is separable from the rest of the treaty, suspension or termination is only admissible for the part of the treaty which is affected by the infringement. The injured State would be bound not to put into question the rest of the treaty. 148/

78. In connection with "contractual" or "conventional" countermeasures another particular problem arises with regard to requirements such as prior demand of cessation or reparation and prior resort to available settlement procedures. Although a prior demand for cessation or reparation seems generally to be a mandatory precondition for resort to unilateral remedial measures consisting in the violation of a general rule, the same requirement does not seem to be equally firm in the case of resort to suspension of compliance with a treaty obligation or to termination. According actually to a part of the literature, suspension and termination would seem to be among the rare cases of measures lawful resort to which would not be dependent on a prior demand of cessation or reparation. In that sense express themselves, inter alios, Reitzer, 149/ McNair, 150/ Lattanzi. 151/

146/ Reflections, op. cit., pp. 21-22.

147/ According to Forlati, M.L., while the principle of proportionality governs "resort to suspension on the basis of the general principle of self-help (reprisals, self-help in a narrow sense and self-defence)", in the cases of "termination or suspension under the principle inadimplenti non est adimplendum, proportionality is substituted by a more specific criterion, namely by the principle, typical synallagma, of quid pro quo (corrispettivo)" (La sanzione, op. cit., p. 92).

148/ Compare, for example, the comment to Article 30 of the Harvard draft (AJIL 1935, Vol. 29, Suppl. 4, pp. 1134-1144); McNair, op. cit., pp. 570-573; Sinha, op. cit., p. 90. Also Article 60, at least with regard to suspension, uses the expression "suspending the operation of the treaty in whole or in part".

149/ Op. cit., p. 80 ff.

150/ The Law of Treaties, op. cit., p. 571.

151/ Sanzioni, op. cit., pp. 542, 544.

79. Another part of the doctrine seems inclined instead to believe that as well as other forms of unilateral reactions, also suspension and termination should be preceded by an unsuccessful demand of compliance with the "primary" or "secondary" obligation. Guggenheim, for instance, thinks that the unilateral termination of the treaty for non-compliance should be preceded by a fruitless sommation accompanied by a reasonable deadline for the lawbreaker to comply with the injured State's claim. 152/ Simma deems the practice and jurisprudence to indicate that: "[w]hen a State esteems that it has been injured by a material breach of a treaty, it is not at liberty immediately to resort to unilateral termination, but has to follow a certain procedure. It will normally start with the registering of a reclamation calling for resumption of performance or for a reply to the claim of termination within a reasonable time. Only on those rather rare occasions where the defaulting State admits from the beginning that it has substantially violated the agreement concerned or where it does not reply at all to the reclamation, may the innocent State then proceed with the termination. In all cases, however, where the allegedly defaulting State denies either the fact of the violation or its character of being a material breach there will be a "difference", a legal solution of which is only possible with the agreement of the parties. In any case, it is a difference highly suitable for settlement by reference t an international court or tribunal. Unilateral termination of the broken treaty is only permitted after the State injured by the breach has tried in vain to arrive at an agreement with the violator." 153/ In that sense had expressed himself Fitzmaurice in his Reports to the ILC on the Law of Treaties. According to him the parties intending to claim termination or invalidity of the treaty must notify and motivate their claim to the counterpart, and then, after the claim has been rejected or not satisfied within a reasonable delay, offer the counterpart to submit the question to th judgement of an arbitral tribunal or, failing acceptance of arbitration, to the ICJ. Only if such an offer is not accepted within a reasonable delay, performance of the treaty can be unilaterally suspended; and only after the lapse of six months without any acceptance of the settlement procedures proposal, the treaty will be terminated by unilateral decision. 154/

80. Once again, it will be for international practice to advise us - de lege lata as well as de lege ferenda - as to whether resort to suspension or termination should be subject to any ad hoc régime. Should or should not

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152/ Traité, Vol. I, op. cit., p. 228.

153/ Reflections, op. cit., pp. 31-32. A similar position is taken by Pisillo Mazzeschi, Risoluzione e sospensione dei trattati per inadempimento, Milano, 1984, p. 339.

154/ See draft Articles 2, 3, 7-19, 23 of the Third Report by Fitzmaurice, YBILC 1958, Vol. II, pp. 28 ff; and Articles 12, 37-39 of his Fourth Report, YBILC 1959, Vol. II, pp. 44, 50-51.

such resort be subject to different, and presumably less strict, conditions and requirements than those applying to countermeasures resorted to outside of a treaty framework?

81. A point which is of relevance to the absolute limitations of unilateral measures in general but raises particular problems in connection with treaty suspension or termination relates to the hypothesis where resort to one or the other of such remedies would affect the rights of States other than the law-breaking State. The question here is whether and to what extent it may be lawful for a State to suspend or terminate, by way of countermeasure, a multilateral treaty. The literature is notoriously in disagreement in that respect. Fitzmaurice, for example, considering the variety of the kinds of obligations deriving from a multilateral treaty, proposes a distinction. On one side he places reciprocal obligations, namely, the so-called "reciprocal" or "divisible" obligations. On another side he places the obligations requiring an integral compliance (namely, the so-called "indivisible" or "integral" obligations). 155/ A suspension or termination measure could thus lawfully be taken by the injured State unilaterally under the generally applicable (relative or absolute) limitations or conditions, with respect to any "divisible" or "reciprocal" obligation binding the injured State vis-à-vis the law-breaking State. On the contrary, no suspension or termination measure can lawfully be taken by the injured State unilaterally with regard to any "indivisible" or "integral" obligation (deriving from the infringed multilateral treaty) non-compliance with which would constitute a violation of the treaty to the detriment of any States participating in the treaty other than the law-breaking State, such detriment going beyond the merely juridical injury inherent in the very infringement of a treaty to which a State is a party.

155/ Fitzmaurice, Second Report, Article 19, YBILC 1957, Vol. II, p. 54, para. 154. The comment to Article 27 of the Harvard draft convention identifies, among the kinds of obligations deriving from a multilateral treaty, those the violation of which infringes directly and particularly the rights of only one of the parties (see AJIL, Vol. 29, Suppl. 4, 1935, pp. 1092-1093). Sereni, for his part, identifies instead that kind of multilateral treaty the violation of an obligation of which, even on the part of one party, frustrates the object and the purpose of the whole treaty for all the parties (Diritto internazionale, Vol. III, pp. 1481-[illegible]). Another part of the doctrine does not distinguish instead, among the various kinds of obligations deriving from a multilateral treaty, mostly in the belief, on one side, that termination would in principle be inadmissible when any participating States are in the position of "third" States (vis-à-vis the violation) which could be injured by the measure (termination); on the other side, that suspension would instead be admissible (Guggenheim, Traité, Vol. I, op. cit., pp. 228-229; McNair, The Law of Treaties, op. cit., p. 580; Morelli, Nozioni, op. cit., pp. 327-328; Kelsen, Principles of International Law, op. cit., p. 358).

82. Partly in conformity with the views just recalled is draft Article 11, paragraph 1, as proposed by Professor Riphagen in 1985, which reads:

> "The injured State is not entitled to suspend the performance of its obligations towards the State which has committed the internationally wrongful act to the extent that such obligations are stipulated in a multilateral treaty to which both States are parties and it is established that:
>
> (a) the failure to perform such obligations by one State party necessarily affects the exercise of the rights or the performance of obligations of all other States parties to the treaty; or
>
> (b) such obligations are stipulated for the protection of collective interests of the States parties to the multilateral treaty; or
>
> (c) such obligations are stipulated for the protection of individual persons irrespective of their nationality". 156/

83. The question will be to see whether suspension and termination of multilateral treaties, or of certain kinds thereof, should in the project be the object of separate consideration or whether the problem should be envisaged within the different broader perspective of the violation, by way of countermeasure, of rules setting forth erga omnes obligations. The problem would thus be dealt with in a more general way regardless of the contractual or customary nature of the rules involved. 157/

156/ YBILC, 1985, Vol. II (Part One) p. 12, Doc. A/CN.4/389.

157/ See infra paras. 121 and 122.

Chapter VIII

The Issue of So-called Self-contained Régimes

84. Related to the possible "speciality" of measures consisting in the infringement of treaty rules is the question of the relationship between the general rules on State responsibility on the one hand and any ad hoc rules that a given treaty or set of treaties may set forth in order to provide for the case of its violation. This problem seems to arise in the presence of those conventional systems or combinations of systems which tend to resolve within their own - contractual and special - context the legal régime of a more or less considerable number of relationships among the participating States, including in particular the consequences of the breaches of the participating States' obligations under the system. Such consequences include, in some cases, special, at times institutionalized, measures against violations. It would follow that the systems in question may affect in a measure, more or less explicitly, the faculté of the participating States to resort to the remedial measures which are open to them under general international law. It seems to be in connection with situations of such a kind that a part of the doctrine speaks, within the framework of the law of State responsibility, of "self-contained" régimes. 158/

85. The most typical - and perhaps the most likely - example of such régimes is probably the "system" set up by the treaties establishing the European Community and the relations resulting therefrom. 159/ Another example

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158/ According to Riphagen, for example, the systems under consideration would constitute "subsystem(s)", namely, "an ordered set of conduct rules, procedural rules and status provisions, which formed a closed legal circuit, for a particular field of factual relationships" (YBILC, 1982, I, p. 202, para. 16). Within any such system primary rules and secondary rules are closely intertwined and are inseparable. The concept is understood differently by Simma, who uses the expression "self-contained régime" in a narrow and more specific sense "to designate a certain category of subsystems, namely those embracing, in principle, a full (exhaustive and definite) set of secondary rules. A "self-contained régime" would then be a subsystem which is intended to exclude more or less totally the application of the general legal consequences of wrongful acts, in particular the application of the countermeasures normally at the disposal of an injured party" (Simma, "Self-Contained Regimes", in NYIL, 1985, pp. 115-116). In particular, according to Simma, the concept of "self-contained régime" would not be appropriate for those subsytems which provide that in case of failure of a special remedy built into the treaty, a more general remedy based upon another treaty (subsystem) or customary international law becomes (re-)applicable (ibid., p. 117).

159/ Reuter, P., Combacau, J., Institutions et relations internationales, Paris, 1980, p. 386; Sørensen, M. "Einige Rechtsordnungen" - Skizze zu einige systemanalytischen Betrachtungen über ein Problem der internationalen Organisation, in: Europäische Gerichtsbarkeit und nationale Verfassungsgerichtbarkeit, Festschrift für H. Kutschner (1981), p. 431; Riphagen, Third Report on State Responsibility, YBILC, 1982, Vol. II (Part One), p. 33; Simma, B., op. ult. cit., pp. 125 ff.

frequently evoked by writers, including the previous Special Rapporteur Professor Riphagen, would be the "conventional system created by human rights treaties." 160/ A self-contained régime consisting of a particularly obvious combination of customary as well as treaty rules would be, according to an ICJ dictum, "the law of diplomatic relations". 161/ The question arising with regard to these "régimes" is whether the existence of remedies specifically provided for within them - remedies at times more advanced - affect in any measure the legal possibility for the participating States to resort to the measures provided for or otherwise lawful under general international law.

86. It should immediately be added, however, that although a problem of "speciality" is generally seen as arising particularly in connection with the régime of countermeasures - and perhaps rightly so - it is not confined thereto. Any real or alleged self-contained régime may also concern other consequences of internationally wrongful acts, first of all what we referred to as the substantive consequences covered by draft Articles 6 to 10 as proposed by us and at present before the Commission's Drafting Committee (cessation, restitution in kind, pecuniary compensation, etc.).

87. The problem concerns, grosso modo, the whole scope of Part Two of the project. As such, this problem should not be dealt with in the section of Part Two concerning countermeasures. It would be dealt with more appropriately within the Section or Chapter of Part Two covering the general principles of the content, forms and degrees of international responsibility. In particular, it is a matter in many ways close to the general problem covered by draft Article 2 of that Chapter. While reserving ourselves to deal with it provisionally in one of the conclusive provisions of the Chapter at present under consideration, we must keep in mind that the relevant draft Article will have to be inserted in its proper place during the second reading of the general principles Chapter.

88. We deem it therefore premature to enter here into a discussion of the so-called "self-contained" régimes. The more so as the substantial material collected so far on the subject leads us to wonder whether and to what extent the concept of "self-contained" régimes is really of relevance for the solution of the problems of State responsibility in connection with which that concept has been brought into the picture so far.

160/ Riphagen, Fourth Report on State Responsibility, YBILC, 1983, Vol. II (Part One), pp. 15 ff.; Simma, B., op. ult. cit., pp. 130 ff.; Meron, T., Human Rights and Humanitarian Norms as Customary Law, Oxford, 1989, pp. 230 ff.

161/ ICJ Rep. 1980, p. 38. See on this problem Dominicé, "Représaille et droit diplomatique", in Recht als Prozess und Gefüge, Festschrift für Hans Huber, Bern, 1981, pp. 541 ff.; Simma, op. ult. cit., pp. 120-122; Elagab, op. cit., p. 120; Sicilianos, op. cit., pp. 346-351.

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THIRD REPORT ON STATE RESPONSIBILITY

By

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Addendum

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Chapter IX.

The Problem of Differently Injured States

89. A further problem is the exact identification of the State or States which, according to the case, are entitled - or in given instances obliged - to react to an internationally wrongful act. The starting point of any thought on the matter is obviously - together with the perception of the essentially inorganic nature of the legal relationships normally arising from internationally wrongful acts - the concept of injured State. A definition of injured State has in fact been envisaged as an essential element of Part Two of the project. We refer to Article 5 as proposed in 1984 and adopted on first reading by the Commission in 1985. 162/ But whatever the merits of that definition - doubts about the full suitability of which have been formulated within the Commission and outside - it seems obvious that differences of degree of involvement surely exist amongst injured States from the viewpoint of the quality and dimension of the suffered injury.

90. A number of qualifications are thus being developed, by scholars and in the Commission, within the general "injured State" notion or class. At the two extremes, one finds terms such as "directly" injured, affected or involved State or States, or "specially" affected State or States, and - opposed to these - "non-directly" or "indirectly" injured or affected or involved States, or "non-specially" affected or injured States. Between the two extremes, one finds concepts such as "more" or "less directly" affected or involved States. Another concept used, is that of "third" State or States. Considering however that a State can be in a "third party" position either in relation to a primary obligation or in relation to a given breach (secondary obligation), the term "third" may be misleading. In the latter sense it would be just a synonym of non-injured State, obviously in the position of "third" party in relation to the wrongful act, meeting as such none of the conditions of the definition embodied, for example, in draft Article 5 of Part Two. The problem, however, - taking for the time being that definition as a starting point - seems to be not so much to determine whether or not a State belongs to the general class of injured States, as to take account of the fact that that general class includes different categories of States from the point of view of the injury, and to determine what consequences may derive therefrom from the point of view of each State's position with regard to its rights, facultés and possibly duties.

91. The attention of the doctrine has been called to this problem - especially since the adoption of Article 19 of Part One - in connection with the wrongful acts consisting in violations of erga omnes obligations, more particularly with regard to the consequences of crimes. The problem related notably to the possible reactions (against wrongful acts of such a kind) on the part of States other than the State which, as a victim of a gross violation, was the "directly" or "most directly" affected: - the said States acting, jointly or separately, possibly within the framework of an

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162/ YBILC, 1985, Vol. II, (Part Two), p. 25.

institutionalized régime. 163/ It did not take long, however, for scholars and the Commission members to realize that similar problems arise in connection with any other wrongful acts - notably delicts - legally involving, in addition to the wrongdoer and one or more directly affected States, other States. 164/ Frequently considered among these situations have been, so far: - the violation of rules of multilateral treaties or of certain kinds of rules contained in such treaties, notably the rules creating so-called non-bilateralizable, or integral rights and obligations (peace treaties, disarmament treaties, treaties on the environment); 165/ - non-compliance with decisions of international judicial bodies; 166/ - non-compliance, not

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163/ This was indeed the main problem dealt with by Riphagen in the context of what our distinguished predecessor called the "third parameter", that is "the position of third States in respect of the wrongful act" (Preliminary Report, YBILC, 1980, Vol. II, (Part One), paras. 62 ff., especially 66 ff., pp. 120-129). On the facultés, rights and duties of States "non-directly" affected by a crime, see, inter alios, P.M. Dupuy, "Action publique et crime international de l'Etat. A propos de l'article 19 du projet de la CDI sur la responsabilité des Etats", in AFDI, Vol. 25, 1979, p. 554, and "Le fait générateur de la responsabilité international des Etats", in Hague Rec., Vol. 188, 1984-V, p. 102; E. Zoller, Peacetime Unilateral Remedies: An Analysis of Countermeasures, Dobbs Ferry, New York, 1984, p. 115; D. Alland, "International Responsibility and Sanctions: Self-Defence and Countermeasures in the ILC Codification of Rules Governing International Responsibility", in M. Spinedi, B. Simma, eds., United Nations Codification of State Responsibility, New York, London, Rome, 1987, pp. 198 ff.; A. De Guttry, Le rappresaglie non comportanti la coercizione militare nel diritto internazionale, Milan, 1985, pp. 283 ff.; M. Spinedi, "Crimes of States: the Legislative History", in J. Weiler, A. Cassese, M. Spinedi (eds) International Crimes of States, Berlin-New York, 1989, pp. 115 ff.; D.N. Hutchinson, "Solidarity and Breaches of Multilateral Treaties", in BYIL, Vol. 61, 1990, pp. 196 ff.; A.L. Sicilianos, Les réactions décentralisées à l'illicite, Paris, 1990, pp. 135 ff.

164/ W. Riphagen, Preliminary Report, cit., paras. 37-42, pp. 114-115 and paras. 62-65, pp. 119-120; A. De Guttry, op.cit., pp. 290-301; K. Sachariew, "State Responsibility for Multilateral Treaty Violations: Identifying the 'Injured State' and Its Legal Status", in Neth. Int. Law Review, 1988, pp. 272 ff.; D.N. Hutchinson, op.cit., pp. 164-196; L.A. Sicilianos, op.cit., pp. 110-134.

165/ See the doctrine cited in para. 81, note 155, of this Report, especially G. Fitzmaurice, Second Report on the Law of Treaties, YBILC 1957, Vol. II, pp. 34 ff. See also, K. Sachariew and D.N. Hutchinson loc. cit. in the preceding note.

166/ M. Akehurst, "Reprisals by Third States", in BYIL, Vol. 44, 1970, p. 14; O. Schachter, "The Enforcement of Judicial and Arbitral Decisions", AJIL, Vol. 54, 1960, pp. 11-12; W.M. Reisman, Nullity and Revision. The Review and Enforcement of International Judgments and Awards, New Haven and London, 1971, pp. 793 ff.; L.A. Sicilianos, op.cit., pp. 103-107.

necessarily gross or massive, with human rights obligations; 167/ - violation of the freedom of the high seas; 168/ - abuse of natural resources of common interest; 169/ - and other situations. 170/ The Commission has expressly considered such other States hypotheses by covering them in subparagraphs (e) (ii) and (iii) and (f) of paragraph 2 of the cited draft Article 5. According to these provisions injured State means:

> "(e) if the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that:
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> (i) the right has been created or is established in its favour;
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> (ii) the infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law; or
>
> (iii) the right has been created or is established for the protection of human rights and fundamental freedoms;
>
> (f) if the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto."

167/ See, inter alios, A. Rougier, "La théorie de l'intervention d'humanité", RGDIP, Vol. 17, 1910, pp. 468 ff.; D. Schindler, "Le principe de non-intervention dans les guerres civiles", in Ann. IDI, Vol. 55, 1973, p. 481; W. Riphagen, Sixth Report on State Responsibility, YBILC, 1985, Vol. II, (Part One), p. 8, Comment to Article 5, para. 22.

168/ G. Tunkin, Droit international public. Problèmes théoriques, Paris, 1965, p. 223; L. Oppenheim, International Law, A Treatise, Vol. I, 8th edition, London, New York, Toronto, 1955, p. 308.

169/ G. Tunkin, op.cit., p. 223; W. Riphagen, Fourth Report on State Responsibility, YBILC, 1983, Vol. II, (Part One), p. 17, para. 90.

170/ The situations of "non-directly" or "less directly" affected States are of course determined, in such instances, by the different degrees of interest of this class of injured States or any ones of them in the compliance with their obligations by others, and mainly by the degrees to which any such interest may be found to be legally protected. References and interesting examples in K. Sachariew, op.cit., especially pp. 278 ff. and L.A. Sicilianos, op.cit., pp. 100 ff. The matter deserves further exploration.

92. Once States which have "less-directly" suffered from a wrongful act are defined as "injured" in accordance with article 5, thus qualifying as parties in the responsibility relationship, the problem arises in determining whether or not the rights and facultés (and possibly duties) arising for them from the wrongful act are subject to the same régime as those of the "directly" or "specially" affected State and, if the answer is in the negative, then to which régime. 171/ The most difficult problem in that respect is precisely to know whether the so-called "indirectly injured" States are entitled to resort to countermeasures and, if so, whether such resort is subject to different, presumably stricter, limitations or conditions than those applying to the measures taken by the "specially affected" State. 172/ The literature which

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171/ This problem has been explicitly brought up in the Commission by Professor Riphagen, in whose view it seems clear "that there is a distinction to be made - for the purpose of determining the legal consequences of a wrongful act - between a State directly affected by a particular breach of an international obligation (the "injured State") and other States, be they parties to the (multilateral) treaty creating the obligation or not. Within a scale of legal consequences, the new legal relationship created by the wrongful act of a State is primarily one between the guilty State and the State (or States) whose material interests are directly affected by that wrongful act" (Preliminary Report, cit., p. 115, para. 42).

172/ Of this kind, for example, is the distinction envisaged in Article 60 of the Vienna Convention on the Law of Treaties, where resort to suspension or termination of multilateral treaties is different for the "specially affected" State and for any other participating State. According to that Article:

> "2. A material breach of a multilateral treaty by one of the parties entitles:
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> (a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:
>
> (i) in the relations between themselves and the defaulting State, or
>
> (ii) as between all parties;
>
> (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;
>
> (c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty."

is not abundant 173/ on this point appears to be divided. Some authors deny that "not directly injured" States are entitled to resort to measures. 174/ Others, on the contrary, admit the possibility, at least in certain cases. 175/

93. It should be noted, however, that the whole matter we are dealing with in the present Chapter concerns more than just countermeasures. Although the question is neglected by a considerable part of the doctrine, there is also - and, in a sense, firstly - the problem to determine whether the so-called "non-directly" injured States are entitled to claim compliance with the substantive obligations involved in the responsibility relationship. 176/ We refer to cessation, restitution in kind, reparation by equivalent and satisfaction, including guarantees of non-repetition. According to Riphagen, for example, a "non-directly" injured State could "not claim damages ex tunc, since by definition there is no injury to its material interest. But a re-establishment ex nunc (to the direct benefit of the injured State!) and a guarantee ex ante against further breaches may well be in the (non-material) interest of that State". 177/

94. It is thus clear that the problems arising from the degree to which a State may be injured reach beyond the subject-matter of the present report, namely countermeasures. It concerns the substantive consequences as well; and, with even greater complications, it also concerns both the substantive and instrumental consequences of crimes. While postponing momentarily the latter, to be dealt with when the subject of crimes is taken up, we believe that our immediate effort should concentrate on a more thorough analysis of practice and doctrine concerning the position of the so-called "non-directly" injured States. This with a view to the elaboration of an ad hoc section of the part of the project covering the consequences of delicts.

173/ We refer in fact to the literature concerning specifically the consequences of delicts - leaving out for the time being the doctrine concerning crimes, to be considered at a further stage.

174/ K.J. Partsch, "Repressalie", in K. Strupp, H.J. Schlochauer, eds., Wörterbuch des Völkerrechts, III, Berlin, 1962, pp. 103 ff.; B. Graefrath, "Responsibility and Damages Caused: Relationship between Responsibility and damages"; in Hague Rec., Vol. 185, 1984-II, p. 86; D.N. Hutchinson, op.cit., p. 170.

175/ L. Oppenheim, Vol. I, op.cit., p. 308; G. Tunkin, op.cit., p. 223; R. Pisillo Mazzeschi, Risoluzione e sospensione dei trattati per inadempimento, Milan, 1984, pp. 216 ff. and 335 ff.; E. Zoller, Peacetime, op.cit., p. 115 ff.; A. De Cuttry, op.cit., pp. 295-298.

176/ Interesting reflections on this issue can be found in the cited works by K. Sachariew and D.N. Hutchinson.

177/ Preliminary Report, cit., p. 114, para. 40.

95. In the section thus envisaged we propose to determine, in the light of the practice of States and international tribunals, whether to add to the distinctions among the kinds of injured States set forth in paragraph 2 of draft Article 5 already adopted but not exempt from criticism, 178/ the differences in the legal situation of "specially" affected States on one side, and the so-called "non-directly" affected States, on the other side. One should determine in particular whether the so-called "non-directly" affected States (namely, the injured States envisaged in the provisions of subparagraphs (e) (ii) (iii) and (f) of paragraph 2 of Article 5), should enjoy: - the right to claim cessation, restitution in kind, reparation by equivalent, and/or satisfaction, including guarantees of non-repetition; - the faculté to resort to countermeasures and, if so whether such a faculté is or should be subject to conditions and restrictions identical to or different from those obtaining for the measures available to "specially" affected States; - whether any further distinctions should not be established within the general category of "non-directly" affected States; - or whether, contrary to the hypotheses formulated so far, no real differences exist or should exist with respect to the consequences of the wrongful acts at present in question, based on the different "position" - of "directly" or "indirectly" affected States - as "active parties" in the responsibility relationship. This very distinction would be, in a sense, a false concept due perhaps to some imprecision in the approach to the problem of the determination of the active side of the responsibility relationship. Only after clarifying this point would one be able to decide whether the rights and facultés (and possibly duties) of "non-directly" affected States should be the object of a distinct section or chapter, or whether any differences in the position of the so-called "non-directly" affected States should be covered by appropriate modifications of the draft articles dealing with the position of "directly" affected States. There is, of course, a third possibility: namely that neither distinct articles nor an adaptation of general articles be really required in order to cover the position of "non-directly" affected States. It is possible, in other words, that that position - with regard to both substantive rights and countermeasures - should be left to depend simply on the normal application, to the position of "non-directly" injured States, of the general rules governing the substantive and instrumental consequences of internationally wrongful acts. The latter possibility might be the most likely in view of the fact that the peculiar features of the position of "non-directly" affected States might well be just a matter of degree.

178/ See the critical observations made by K. Sachariew, op.cit., pp. 274-276 and L.A. Sicilianos, op.cit., pp. 116-119.

CHAPTER X

Substantive Limitations Issues

96. The most important, in the area now under review is, of course, the set of problems concerning the means injured States may lawfully deploy - severally or jointly - in the exercise of their faculté of unilateral reaction to an internationally wrongful act. These issues are: (a) the unlawfulness of resort to force; (b) respect for human rights in the widest sense; (c) the inviolability of diplomatic and consular envoys; (d) compliance with imperative rules and erga omnes obligations. The difficulty of these matters imposes separate, however brief, assessments of the main issues they respectively involve.

A. The Prohibition of Force

97. The main proposition offered by the literature - and confirmed by a number of authoritative pronouncements of international political and judicial bodies 179/ - is of course the condemnation of any form of armed reprisals or countermeasures. The prevailing view is more precisely in the sense that such a condemnation is not just a matter of contractual - United Nations Charter -

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179/ Among the main elements upon which the condemnation of armed reprisals is considered to rest (in addition to the comprehensive article 2 (4) of the United Nations Charter and in support of the consolidation of the prohibition into a general rule) one can list inter alia: the ICJ's statement in the Corfu Channel case with respect to the recovering of the mines from the Corfu Channel by the British Navy ('Operation Retail') (ICJ Reports 1949, p. 35, see also YBILC, 1979, II, (Part One) para. 89); Security Council Res. S/3538 of 19 January 1956, Res. S/5111 of 9 April 1962, Res. 188 of 9 April 1964; paragraph 6 of the first principle of the "Friendly Relations" Declaration (Res. 2625 (XXV) of 24 October 1970); Sect. II, (c) of General Assembly Res. 36/103 (9 December 1981) on "Inadmissibility of Intervention and Interference in the Internal Affairs of States"; and the recent ICJ judgement in the Military and Paramilitary Activities in and Against Nicaragua case (ICJ Reports 1986, paras. 248-249, p. 127). The Helsinki Final Act of August, 1975, contains an explicit condemnation of forcible measures as well. Part of Principle II of the Declaration of Principles embodied in the first "Basket" of that Final Act reads: "Likewise they [the participating States] will also refrain in their mutual relations from any act of reprisal by force" (Text in L. Sohn, ed., International Organisation and Integration, II,D,1.a.i., The Hague/Boston/London, 1983, p. 3).

law. Together with the whole content of Article 2, paragraph 4 of the Charter, that prohibition would have become, according to the said prevailing view, a part of general, unwritten international law. 180/

98. According to other views - views determined by some persistent practices - there would be forms of unilateral (individual or collective) resort to force that would have either survived the sweeping prohibition of Article 2, paragraph 4 or resuscitated as a justifiable form of reaction: this under the concepts of forcible or armed reprisals or self-defence. 181/ According to some of the writers more or less decidedly holding the said views "a total outlawry of armed reprisals ... presupposed a degree of community cohesiveness and, with it, a capacity for collective action to suppress any

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180/ In the sense that the prohibition of armed reprisals has acquired the status of a general ("customary") rule, the contemporary doctrine (in conformity with the cited 1986 ICJ judgment) is almost unanimous (I. Brownlie, International Law and the Use of Force by States, Oxford, 1963, pp. 110 ff. and pp. 281-282; P. Reuter, Droit international public, Paris, 1983, pp. 510 ff. and in particular pp. 517-518; A. Cassese, Il diritto internazionale nel mondo contemporaneo, Bologna, 1984, p. 160; H. Thierry, J. Combacau, S. Sur, Ch. Vallée, Droit International Public, Paris, 1986, pp. 192, 493 ff., particularly p. 508; B. Conforti, Diritto internazionale, Napoli, 1987, p. 356; Ch. Dominicé, "Observations sur les droits de l'Etat victime d'un fait internationalement illicite", in Droit international 2, Paris, 1981-1982, p. 62; F. Lattanzi, Garanzie dei diritti dell'uomo nel diritto internazionale generale, Milan, 1983, pp. 273-279; J.C. Venezia, "La notion de représaille en droit international public", in RGDIP, Vol. 64, 1960, pp. 465 ff. p. 494; J. Salmon, "Les circonstances excluant l'illicéité", in Responsabilité internationale, Paris, 1987-1988, p. 186; W. Riphagen, Fourth Report on State Responsibility, YBILC, II, (Part One) 1983, p. 15, para. 81). The minority who doubt the customary nature of the prohibition are equally firm in recognizing the presence of a unanimous condemnation of armed reprisals in Article 2 (4) of the Charter as reaffirmed in the Friendly Relations Declaration (see, for example, J. Kunz, "Sanctions in International Law", in AJIL, Vol. 54, 1960, pp. 325 ff; G. Morelli, Nozioni di diritto internazionale, Padova, 1967, pp. 352 and 361 ff.; G. Arangio-Ruiz, "The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations", in Hague Rec., Vol. 137, 1972-III, p. 536). It is also significant that the majority of the recent monographic studies on reprisals are expressly confined to "non-armed" or, perhaps less precisely, "non-forcible" reprisals or measures (we refer, in particular, to the cited works by A. De Guttry, and E. Zoller, and to the work by O.Y. Elagab, The Legality of Non-Forcible Countermeasures in International Law, Oxford, 1988). These authors obviously assume that "the prohibition to resort to reprisals involving armed force had acquired the rank status of a rule of general international law" (A. De Guttry, op.cit., p. 11).

181/ R.A. Falk, "The Beirut Raid and the International Law of Retaliation", AJIL, Vol. 63, 1969, pp. 415-443; D.W. Bowett "Reprisals Involving Recourse to Armed Force", in AJIL, Vol. 66, 1972, pp.1-36;

resort to unlawful force which has simply not been achieved". 182/ A further cause for resort to forcible measures would seem to be the fact that during the last decades guerrilla activities have increased enormously. With respect to the law on armed reprisals these activities pose a special problem. 183/ Analysing incidents in the Israeli-Palestinian context brought before the Security Council, one of the cited authors concluded "that the Security Council has never been able to stop the practice of reprisals and may now be moving towards a partial acceptance of 'reasonable' reprisals". 184/ He observed that "if this trend continues, we shall achieve a position which, while reprisals remain illegal de jure, they become accepted de facto". 185/ Another author goes decidedly further when he observes that the use of armed coercion is proven by practice to be indispensable to protect the objectives of the Charter: "[t]here is a need perhaps for some kind of reinstitution of

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R.W. Tucker, "Reprisals and Self-Defense: The Customary Law", AJIL, Vol. 66, 1972, pp. 586-596; R. Lillich, "Forcible Self-Help under International Law", in 62 United States Naval War College - International Studies (1980), Readings in International Law from the Naval War College Review 1947-1977 (R. Lillich and Moore, eds.), Vol. II: The Use of Force, Human Rights and General International Legal Issues; D. Levenfeld, "Israeli Counter Fedayeen Tactics in Lebanon: Self-Defense and Reprisal under Modern International Law", Columbia Journal of Transnational Law, Vol. 21, 1982, p. 148; Y. Dinstein, War, Aggression and Self-Defence, Cambridge 1988, pp. 202 ff. For a critical review of this literature, see R. Barsotti, "Armed Reprisals", in A. Cassese, ed., The Current Legal Regulation of the Use of Force, Dordrecht, Boston, Lancaster, 1986, pp. 81 ff.

182/ D.W. Bowett, in AJIL, Vol. 66, op.cit., p. 2. But similar considerations had been put forward earlier. See, for example, E.S. Colbert, Retaliation in International Law, New York, 1948, and J. Stone, Aggression and World Order. A Critic of United Nations Theories of Aggression, London, 1958, especially pp. 92 ff. Bowett continues "[A]s States have grown increasingly disillusioned about the capacity of the Security Council to afford them protection against what they would regard as illegal and highly injurious conduct directed against them, they have resorted to self-help in the form of reprisals and have acquired the confidence that, in doing so, they will not incur anything more than a formal censure from the Security Council" (op.cit., p. 2).

183/ "Guerrilla forces seeking to overthrow established governments often operate from safehavens located in adjoining States ... The State of refuge often pleads lack of competence or knowledge ..., leaving the target State no viable legal recourse beyond measures within its own borders" J.L. Taulbee, J. Anderson, "Reprisal Redux", Case Western Reserve Journal of International Law, Vol. 16, 1984, pp. 309-336, p. 322.

184/ D. Bowett, in AJIL, Vol. 66, 1972, op cit., p. 21.

185/ Ibid., pp. 10-11. The same and other authors stress that these realities of State practice cannot be ignored, especially since the United Nations Security Council on several occasions appeared to condone forcible measures.

reprisal - if not in the most classical sense, then in a more limited sense - as some kind of sanctioning instrument under international law". 186/ As regards the answers - legal or quasi-legal answers - three different lines of thought have been put forward in order to reduce the discrepancy between the law and the actual practice. One author tries to develop a framework of criteria (of reasonableness), compliance with which would result in the non-condemnation of given armed measures. 187/ "The result redefines the right of an individual State to use violence in a manner that minimizes the

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186/ R. Lillich, op.cit., p. 133.

187/ In his article on the Beirut Raid and the international law of retaliation, Falk maintains that it is impossible, or at least unrealistic to hold on to the unqualified prohibition of armed reprisals. He suggests a framework embodying general guidelines or policies for States to restrain their resort to, and the intensity and duration of forcible measures in periods of peace:

"(1) That the burden of persuasion is upon the government that initiates an official use of force across international boundaries;

(2) That the governmental user of force will demonstrate its defensive character convincingly by connecting the use of force to the protection of territorial integrity, national security, or political independence;

(3) That a genuine and substantial link exists between the prior commission of provocative acts and the resultant claim to be acting in retaliation;

(4) That a diligent effort be made to obtain satisfaction by persuasion and pacific means over a reasonable period of time, including recourse to international organizations;

(5) That the use of force is proportional to the provocation and calculated to avoid its repetition in the future, and that every precaution is taken to avoid excessive damage and unnecessary loss of life, especially with respect to innocent civilians;

(6) That the retaliatory force is directed primarily against military and para-military targets and against military personnel;

(7) That the user of force make a prompt and serious explanation of its conduct before the relevant organ(s) of community review and seek vindication therefrom of its course of action;

(8) That the use of force amounts to a clear message of communication to the target government so that the contours of what constitutes the unacceptable provocation are clearly conveyed;

devolution from the generally agreed interpretations of Charter norms". 188/ Another writer suggests that one interpret the legal notion of self-defence in a broad sense so as to comprise forcible measures. 189/

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(9) That the user of force cannot achieve its retaliatory purposes by acting within its own territorial domain and thus cannot avoid interference with the sovereign prerogatives of a foreign State;

(10) That the user of force seek a pacific settlement to the underlying dispute on terms that appear to be just and sensitive to the interests of its adversary;

(11) That the pattern of conduct of which the retaliatory use of force is an instance exhibits deference to considerations (1) - (10), and that a disposition to accord respect to the will of the international community be evident;

(12) That the appraisal of the retaliatory use of force take account of the duration and quality of support, if any, that the target government has given to terroristic enterprises". (R.A. Falk, op.cit., pp.440-442).

188/ J.L. Taulbee, J. Anderson, op.cit., p.325.

189/ In 1972, Tucker argued that the right to have recourse to forcible reprisals formed part of the customary right to self-defence included in the broad interpretation of Article 51: "the substance of the measures forbidden by Article 2, paragraph 4, may, in effect, be permitted under the guise of self-defense by Article 51" (R.W. Tucker, op.cit., pp. 594). "Indeed, so broad is the license afforded by the customary right of self-defense that it is difficult to see what forcible reprisals added of significance to the State's right to use force in self-help that was not already implicit in self-defense" (ibid., p. 593). "[W]hile there is a difference in the conditions held to govern the exercise of forcible reprisals and self-defense [in case of forcible reprisals a State must first have sought to obtain redress for the alleged injury by peaceful means, p. 590] even this difference appears quite modest when applied to provocative unlawful behavior occuring within the context of a generally antagonistic relationship between States" (ibid., p. 593). Also Dinstein recently tried to justify certain kinds of armed reprisals (namely those against acts of terrorism) extending the scope of the exception of self-defence as provided for in Article 51 of the Charter. In particular, this author distinguishes between "offensive reprisals" which would fall under the prohibition of Article 2 (4) and "defensive reprisals" which would instead be exempted from this prohibition by virtue of Article 51 (op.cit., pp. 202 ff.).

Another one seems to attempt a combination of both methods while stressing the need for effective international fact-finding missions. 190/.

99. The practice of States which has prompted the said literature - a practice, to be sure, not so abundant and geographically limited - raises indeed questions. The main question is whether the absolute condemnation of force contained in Article 2, paragraph 4 applies even in cases of wrongful acts involving force but not qualifying as armed attacks (aggression) and thus not justifying self-defence as strictly defined, or whether any exceptions to the said strict rule are admissible or tolerable: and if so, in what circumstances and under what legal conditions. Examples would presumably be, according to the aforementioned doctrines, armed reaction to forms of indirect aggression and terrorism. It should not be overlooked, however, that the problem of lawfulness arises also in connection with forcible reprisals resorted to by way of reaction to wrongful acts not involving armed force although particularly serious. We refer to cases of resort to force by way of

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190/ Although he also thought that the discrepancy between the law and actual practice would be reduced if "the Council took a broader view of self-defense", Bowett still held, contrary to Tucker, armed reprisals to be prohibited in international law (D.W. Bowett, in AJIL, Vol. 66, 1972, op.cit., p. 22). "The clear position is that the Council, as a matter of principle, condemns armed reprisals as illegal. The unclear position emerges from the Council's failure to condemn in certain circumstances" (ibid.). "The principle as part of the broader prohibition of the use of force, is jus cogens, and no spasmodic, inconsistent practice of one organ of the United Nations could change a norm of this character" (ibid., pp. 21-22) (emphasis added). "This is the more so, because ... in the context of the General Assembly's adoption of the 'Declaration on Principles of International Law', etc., in October, 1970, the reiteration of the formal principle of the illegality of armed reprisals was quite categorical" (ibid., emphasis added). Nonetheless, since States sometimes ignore this prohibition, and because one has to guard for a serious degeneration of the law, Bowett proposes a three-fold approach to the problem of restraining resort to forcible reprisals. He firstly endorses, with some qualification, Professor Falk's framework as "guides to moderation by decision makers .... so as to contain reprisals within limits of reasonableness" (ibid., p. 32). Secondly, he proposes: "the establishment of appropriate and effective machinery for fact-finding and intermediate review by impartial agencies, with authority derived from competent international organs rather than the parties" (ibid., emphasis added). Bowett's last suggestion for the restraint of resort to forcible reprisals is the "application of constraint in the form of sanctions by competent organs of final review such as the Security Council or, exceptionally, an appropriate regional body, designed to ensure compliance with authoritative censure of any policy of reprisals or illegal activities likely to give rise to reprisals" (ibid., emphasis added).

reaction to "economic aggression", to violations of self-determination, 191/ or in order to safeguard the lives of nationals in a foreign State or in pursuit of other, non-national, humanitarian purposes. 192/

100. While reserving any conclusion with regard to resort to force by way of reaction to wrongful acts qualified as crimes of States under draft Article 19, no definite conclusions can be reached with regard to the applicability of the doctrines in question to countermeasures against ordinary wrongful acts. We are only able to anticipate, subject to more accurate analysis, our inclination to believe that the said doctrine should have no place, even de jure condito, within the framework of the consequences of international delicts. We are unable to envisage any possibility for the Commission to admit any derogation from the prohibition of armed reprisals as implied in Article 2, paragraph 4 of the Charter and emphasized in the relevant part of Resolution 2625 (XXV). Like others we are not convinced by arguments on the necessity of altering current prohibitions in order to adapt them to the realities of State practice. 193/

101. Another problem which has been raised in the doctrine and practice concerning the condemnation of force, is the possible impact of that prohibition on the lawfulness of economic coercion (or certain kinds thereof) as a form of countermeasure. According to the most widely accepted

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191/ On these issues see the recent study by L.A. Sicilianos, op.cit., pp. 389-395, 427-455.

192/ See, inter alios, N. Ronzitti, Il ricorso alla forza armata a protezione dei cittadini all'estero e per ragioni d'umanità, Pisa, 1980; and D.W. Bowett, "The Use of Force for the Protection of Nationals Abroad", in A. Cassese, ed., The Current Legal Regulation, op.cit., pp. 39-55.

193/ To put it with Taulbee and Anderson, "(t)hose arguments rest upon events and situations that are transitory or which are not amenable to control through legal means" (J.L. Taulbee, J. Anderson, op.cit., p. 333). The said arguments are indeed furthermore unconvincing because "the idea that the law should authorize what it cannot constrain is especially pernicious". "[T]he prudent course is to tolerate certain practices when necessity demands rather than investing them with the sanctity of a legal rule. The seeming disorder of contemporary life should not diminish the view of the Charter" (ibid., p. 333-334). Similarly, Barsotti observes that "from a quantitative point of view (that is, judging from the frequency of relevant actions) the divergence between the prohibition of armed reprisals, embodied in the Charter, and actual practice, is not so serious as to give grounds to the belief that there is a process of degeneration of the ban in question" (op.cit., p. 90).

interpretation of the prohibition of force, notably of paragraph 4 of Article 2 of the United Nations Charter (and any "equivalent" rule of general international law), the term "force" means military force only. Any objectionable forms of economic coercion could only be condemned - as some of them are expressly condemned in international instruments other than the Charter - as a part of the distinct rule prohibiting intervention or given forms thereof. 194/ In particular, economic coercive measures would be prohibited - by the Charter of the Organization of American States, the Friendly Relations Declaration and other instruments including principle VI of the Helsinki Final Act - whenever they were resorted to against a State "in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it adavantages of any kind". 195/

102. The opposite argument according to which Article 2, paragraph 4 of the Charter would prohibit not only armed reprisals but also economic coercion has been initially affirmed in official statements and doctrinal contributions

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194/ Cfr. H. Waldock, "The Regulation of the Use of Force by Individual States in International Law", Hague Rec., Vol. 81, 1952-II, pp. 493-4; L. Oppenheim, op.cit., Vol. II., p. 153; D.W. Bowett, "Economic Coercion and Reprisals by States", Virg. JIL, Vol. 13, 1972, p. 1; R. Lillich, "The Status of Economic Coercion Under International Law: United Nations Norms", in R. Mersky ed., Conference on Transnational Economic Boycotts and Coercion, 19-20 February 1976, University of Texas Law School, Vol. I., pp. 116-17; A. Beirlaen, "Economic Coercion and Justifying Circumstances", RBDI, Vol. 18, 1984-5, p. 67; M. Virally, "Commentaire de l'article 2 par. 4 de la Charte", in J.P. Cot, A. Pellet, eds., La Charte des Nations Unies, Paris-Bruxelles, 1985, pp. 120-21; C., Leben, "Les contre-mesures inter-étatiques et les réactions à l'illicite dans la société internationale", in AFDI, Vol. 28, 1982, pp. 63-69; P. Malanczuk, "Countermeasures and Self-Defence as Circumstances Precluding Wrongfulness in the ILC's Draft Articles on State Responsibility", in ZaöRV, Vol. 43, 1983, p. 737; O.Y. Elagab, op.cit., p. 201; I. Seidl-Hohenveldern, "International Economic Law", Hague Rec., Vol. 198, 1986-III, pp. 200-1, American Law Institute, Restatement of Law Third, St. Paul (Minn.), 1987, p. 383; L.A. Sicilianos, op.cit., pp. 248-253.

195/ For this interpretation: D.W. Bowett, op.cit., in Virg. JIL, Vol. 13, 1972, pp. 2-3; Y. Blum, "Economic Boycotts in International Law", in Conference on Transnational Economic Boycotts, op.cit., p. 96; P. Malanczuk, op.cit., p. 737; A. Beirlaen, op.cit., p. 67; I. Seidl-Hohenveldern, "The United Nations Economic Coercion", in RBDI, vol. 18, 1984-5, p. 11; and J. Salmon, op.cit., p. 186. On this point see also, L. Boisson de Chazournes, Les contre-mesures dans les relations internationales économiques, Thèse présentée à l'Université de Genève, 1990, Chapter III, Part A, Section 3, para. 3.2, pp. 149-151.

from developing and socialist countries. 196/ But, following the Arab oil embargo of 1973, even some Western authors supported this position. 197/ According to a different opinion, based inter alia on the absence in the Charter of any provision condemning individual coercive measures other than Article 2, paragraph 4, it would be more correct to think that whenever a measure of economic coercion assumed such features and dimensions as to determine consequences amounting to a "strangulation" of the target State, the form of violence they imply does not differ in aim or result from the exercise of a resort to armed force. One should admit, in the presence of such a possibility, that "the term force means more than just armed force". Indeed, the prohibition contained in Article 2, paragraph 4 should be logically understood to "embrace also measures of economic or political pressure applied either to such extent and with such intensity as to be an equivalent of an armed aggression or, in any case - failing such an extreme - in order to force the will of the victim State and secure undue advantages" for the acting State. 198/ This variety of opinions imposes an accurate investigation of the practice of States in order to determine whether resort to certain kinds of economic measures against a wrongdoing State may constitute under given extreme conditions an unlawful resort to force. Were such to be the case, one should further determine whether such a practice would be condemned under the same (written and unwritten) rule prohibiting armed force or under the rule condemning given forms of intervention.

B. Respect for Human Rights and Other Humanitarian Values

103. The necessity of setting to reprisals limitations dictated by "supreme exigencies of civilization and humanity" seems to have mainly manifested itself, at the outset, in the regulation of belligerent reprisals. It was indeed principally in time of war that those exigencies came in fact more frequently to be sacrificed. However, the belief in the existence of inviolable ethical limits to the exercise of reprisals led early to the recognition that the limitations of reprisals in wartime should apply

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196/ We refer, inter alia, to the position of J. Zourek, "La Charte des Nations Unies interdit-elle le recours à la force en général ou seulement à la force armée?", in Mélanges Rolin, Paris, 1964, pp. 530 ff.; and M. Obradovic, "Prohibition of the Threat or Use of Force", in M. Sahovic, ed., Principles of International Law Concerning Friendly Relations and Cooperation, Belgrade, New York, 1972, pp. 76 ff.

197/ J.J. Paust, A.P. Blaustein, "The Arab Oil Weapon - A Threat to International Peace", in AJIL, Vol. 68, 1974, pp. 420 ff.

198/ G. Arangio-Ruiz, "Human Rights and Non-Intervention in the Helsinki Final Act", in Hague Rec., Vol. 157, 1977-IV, p. 267. A similar position is taken by A. Cassese, Diritto internazionale, op.cit., p. 163.

a fortiori in time of peace. 199/ A case in point is once more the doctrine which was applied in Naulilaa, according to which for a reprisal to be lawful it must be "limitée par les exigences de l'humanité et les règles de la bonne foi applicables dans les rapports d'Etat à Etat". 200/

104. The "supreme exigencies" in question (as applying in peacetime) affected in the first place the limits within which reprisals could not unlawfully cause injury to foreign nationals. Whatever the seriousness of the violation involved, the injured State's measures could not be such as to tread upon certain fundamental principles of humanity to the detriment of the offending State's nationals in the injured State's territory: by violating, for example, their right to life, their right not to be subjected to physical or moral violence, notably to torture, slavery or any other indignity. 201/

105. Beside the exigency of the protection of foreign nationals, the importance of the respect for fundamental humanitarian principles in general was equally stressed early. For example, in the course of the League of Nations Assembly's debates on the implementation and amendment of Article 16 of the Covenant with regard to the economic measures to be applied in case of aggression, the necessity was repeatedly voiced not to endanger in any case humanitarian relations. 202/ The 1934 Resolution of the International Law Institute states in paragraph 4 of Article 6 that in the exercise of reprisals a State must "s'abstenir de toute mesure de rigueur qui serait contraire aux lois de l'humanité et aux exigences de la conscience publique". 203/

199/ See F. Lattanzi, Garanzie, op.cit., pp. 293-302; similarly A. De Guttry, op.cit., pp. 268-271. After explaining that resort to one or the other of the possible coercive measures depends on the choice of States, Anzilotti noted that States are not absolutely free in their choice: and after listing a number of actions which were condemned by the laws of warfare although they constitute a minus as compared to warfare itself, concluded that a fortiori they were to be condemned in peacetime (Corso di diritto internazionale pubblico, v. III, Rome, 1915, pp. 166-67).

200/ Unriaa, II, p. 1026.

201/ As early as 1888, for example, following the violation by the United States of the 1880 treaty on the establishment of Chinese nationals (the "Chinese exclusion Act"), China, while suspending performance of its treaty obligations towards the United States, decided nevertheless to respect, for reasons of humanity, the rights of United States nationals under Chinese jurisdiction (Foreign Relations of the United States 1889, p. 132). Recently, in its comment to Article 905 the cited Third Restatement of the Law affirms that "Self-help measures against the offending State may not include measures against the State's nationals that are contrary to the principles governing human rights and the treatment of foreign nationals" (Restatement, op.cit., p. 381).

202/ League of Nations, Reports and Resolutions on the Subject of Article 16 of the Covenant, 13 June 1927, p. 11 ff.

203/ Ann. IDI, Vol. 38, 1934, p. 709.

106. The impact of the general principles in question has been strengthened and specified thanks to the relatively recent development of that substantial corpus of rules which constitute the contemporary law of human rights. Letting aside the question whether and to what extent the treaty rules in the field of human rights have become or are close to becoming a part of general international law, it cannot be doubted that this development brings about a further restriction of the liberty of States to resort to forms of reprisals susceptible of imperilling the human interests for the protection of which that development has taken place. 204/

107. Explicit indications to that effect are contained in provisions of international instruments on human rights. Article 4 of the 1966 United Nations Covenant on Civil and Political Rights provides that States "may take measures derogating from their obligations under the present Covenant" only "in time of public emergency which threatens the life of the nation": and even under circumstances of that kind States are not to take measures derogating from some fundamental principles of humanity. It has been inferred that the rights contemplated in the Covenant cannot be infringed by measures taken by way of reaction to an internationally wrongful act. 205/ Of relevance is also paragraph 5 of Article 60 of the Vienna Convention on the Law of Treaties (adopted by 87 votes in favour, 9 abstensions and no opposition) according to which suspension or termination - partial or total - of a treaty in case of a material violation shall in no case be resorted to with regard "to provisions relating to the protection of the human person contained in treaties of a humanitarian character". 206/ Schachter is of the

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204/ In this sense, inter alios, G. Morelli, Nozioni, op.cit., p. 362; P. Reuter, op.cit., p. 463; W. Riphagen, Fourth Report, op.cit., p. 17, paras. 88-89; Ch. Dominicé, op.cit., p. 62; E. Zoller, "Quelques réflexions sur les contre-mesures en droit international public", in Etudes Colliard, Paris, 1984, p. 376; O. Schachter, "Self-Help in International Law: US Action in the Iranian Hostages Crisis", in Journal of International Affairs, Vol. 37, 1983-1984, pp. 231-233.

205/ A. De Guttry, op.cit., p. 271.

206/ On the inapplicability of the principle of reciprocity in case of violations of human rights treaty obligations, see F. Lattanzi, Garanzie, op.cit., pp. 302 ff.; L.A. Sicilianos, op.cit., pp. 352-358. On the same line draft Article 11 of Part Two of the project as proposed by our predecessor states that "[t]he injured State is not entitled to suspend the performance of its obligations towards the State which has committed the internationally wrongful act to the extent that such obligations are stipulated in a multilateral treaty to which both States are parties and it is established that: (c) such obligations are stipulated for the protection of individual persons irrespective of their nationality" (W. Riphagen, Sixth Report on State Responsibility, YBILC, Vol. II, (Part One) p. 12).

opinion that "treaties covered by this paragraph clearly include the Geneva Convention for the protection of victims of war, the various human rights treaties, and conventions on the status of refugees, genocide and slavery". 207/

108. It remains, of course, to be seen to what extent rules such as those in which no explicit mention is made of measures of reaction to an internationally wrongful act condition the choices of injured States with regard to measures under general international law. The question can notably be raised whether and to what extent limitations of the said choices could also derive from the United Nations Covenant on Economic, Social and Cultural Rights.

109. The rules evoked in the preceding paragraphs are interpreted quite extensively by some authors. They affirm, for example, that limitations can not only be derived from treaties and general rules on human rights (or from the humanitarian law of armed conflicts) but from any rules intended in any way to safeguard the moral and material interests of human beings. An injured State could thus not react by terminating (or even suspending) a treaty providing forms of economic assistance to the offending State with a view to improving the conditions of a part of the latter's population. 208/ This should safeguard, for example, the obligations of injured States in the area of international cooperation to development as envisaged within the framework of the New International Economic Order. 209/ But an opposite view is taken by others, for example by Conforti. 210/

207/ O. Schachter, "International Law in Theory and Practice. General Course in Public International Law", Hague Rec., Vol. 178, 1982-V, p. 181. The inviolability of these rules (by way of reprisal) is also maintained by K. Zemanek, "Responsibility of States: General Principles", in Enc. of Publ. Int. Law, Vol. 10, 1987, p. 371.

208/ A. Cassese, Il Diritto Internazionale, op.cit., p. 271. In the same sense, L. Boisson de Chazournes, op.cit., Chapter III, Part A, Section 3, para. 3.3, p. 153.

209/ Similarly, O.Y. Elagab, op.cit., p. 194, is of the opinion that cases of economic coercion of particular severity should be identified, for instance, by applying the "factor of dependence and reliance": - that is, by examining whether and to what extent measures have as their object commod.ties or services that are vital to the well-being of the State against which the measures are directed. This consideration would be of particular importance in case of measures directed against developing countries.

210/ B. Conforti, op.cit., p. 360.

110. The difficulty in setting the threshold beyond which countermeasures are or should be condemned for the infringement of humanitarian obligations in a broad sense lies in the precise determination of the human rights and interests the violation of which would not be permitted even in the exercise of a reaction to a State's unlawful act. Surely not any human right or interest could reasonably so qualify.

111. An obvious instance is the question whether the faculté of reprisals finds any limitation in the rules protecting the property of nationals abroad and particularly the assets of business companies. Different trends can be identified in the literature. According to one of these, reprisals against the private property of nationals of the offending State would be unlawful in that ownership would qualify as an element of the wider category of human rights covered by the rules considered in the preceding paragraphs. 211/ Other writers believe that one should apply to this matter a fortiori - in peacetime - the jus in bello prohibition of the taking of private property: "The taking by a State of the property of foreigners in the pursuit even of actual hostilities against their home-country is not justified under general international law. It will therefore be justified even less as a mere measure of reprisal". 212/ Schachter believes, however, that this opinion is not confirmed by the prevailing practice: "Blocking and confiscation of private property of nationals of an enemy State have been common in time of war and generally condoned as wartime measures. However, the seizure of private property as countermeasure against an offending State in time of peace has been characterized as illegal by some jurists but nonetheless carried out by States in recent years". 213/

112. Some commentators of the practice of measures involving private foreign property propose a distincion between final or definitive taking of property, on one side, and temporary measures such as seizure, blocking, freezing et similia, on the other side. The former are generally considered to be

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211/ R. Higgins, "The Taking of Property by the State: Recent Developments in International Law", in Hague Rec., Vol. 176, 1982-II, p. 355.

212/ I. Seidl-Hohenveldern, "Reprisals and the Taking of Private Property", in De Conflictu Legum, Leyden, 1952, p. 475. See also the other authors quoted by A. De Guttry, op.cit., p. 277, note 121.

213/ O. Schachter, "International Law", op.cit., p. 181; see also, E. Borchard, "Reprisals on Private Property", AJIL, Vol. 30, 1936, pp. 108-113. The admissibility of violations of property rights as a form of countermeasure is recently maintained also by L. Boisson de Chazournes (op.cit., Chapter III, Part A, Section 3, para. 3.3, p. 156), who underlines, however, the necessity of the "respect du principe du réglement pacifique de différends et [du] respect de la condition de la proportionnalité".

unlawful while the latter would not be condemnable. 214/ Schachter derives the inadmissibility of the first kind of measures from reasonableness rather than an incompatibility with the raison d'être of reprisals. It would notably be on the basis of reasonableness that the reacting injured State should observe a relative restraint. 215/ According to De Guttry there would be a growing feeling that it is unjust to sacrifice the private property of persons who normally have no part whatsoever in the offending States' wrongful conduct: and this would be gradually leading - albeit not without contradictions - to confine this kind of reprisals only to extreme cases. 216/ More than half a century ago, the International Law Institute expressed itself in the same sense, when it suggested to: "limiter les effets des représailles à l'Etat contre qui elles sont dirigées, en respectant, dans toute la mesure du possible, tant les droits des particuliers que ceux des Etats tiers". 217/

113. Although the most obvious issue is that of the extent to which the exercise of countermeasures should meet an obstacle in the right of private property, more thought should be given to other areas of humanitarian interests where similar problems arise. Examples are the property of cultural institutions, works of art, pharmaceutical industries and public health facilities.

C. Inviolability of Specially Protected Persons

114. It is a widespread doctrinal notion that acts of reprisal would be unlawful if taken in violation of international obligations aimed at the protection of diplomatic envoys and heads of State. Oppenheim states that: "Individuals enjoying the privilege of extra-territoriality while abroad such as heads of States and diplomatic envoys, may not be made the object of

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214/ Among recent commentators, this is the view taken, for example, by E. Zoller, Peacetime, op.cit., pp. 73-74; O.Y. Elagab, op.cit., p. 11; and P. Malanczuk, in M. Spinedi, B. Simma, eds., op.cit., p. 225, on the ground of the irreversible nature of definitive taking and the reversible nature of the temporary measures.

215/ O. Schachter, "International Law", op.cit., p. 182.

216/ A. De Guttry, op.cit., p. 280. Similarly, L.A. Sicilianos, op.cit., p. 360.

217/ Art. 6, para. 3 of the Resolution concerning "le régime des représailles en temps de paix", Ann. IDI, Vol. 38, 1934, p. 709.

reprisals, although this has occasionally been done in practice". 218/ Only a few authors, it seems, question the existence of a rule of general international law condemning otherwise not unlawful acts of coercion directed against diplomatic envoys. 219/

115. Some of the writers who discuss the raison d'être of the limitation in question seem to believe that it derives from the primary - and peremptory - rules concerning the protection of diplomatic envoys. 220/ Other writers argue the matter on the ground of the "self-contained" or otherwise particular nature of the law of diplomatic relations. 221/ Among these is our distinguished predecessor, according to whom the limitation in question would be a case: "which does not lend itself to generalization within the context of the inadmissibility of specific reprisals. Indeed, the case seems rather

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218/ L. Oppenheim, International Law, Vol. II, 7th edition, op.cit., p. 140. This opinion was expressed by Hugo Grotius, De Jure Belli Ac Pacis Libri II, The Classics of International Law, J.B. Scott ed., Washington, 1925, Chapter 18, S.iii, S.viii. According to Twiss, diplomatic agents "cannot be the subjects of reprisals, either in their persons or in their property, on the part of the Nation which has received them in character of envoys (legati), for they have entrusted themselves and their property in good faith to its protection (T. Twiss, The Law of Nations considered as Independent Political Communities, London and Oxford, 1863, p. 39). See also Ph. Cahier, Le droit diplomatique contemporain, Genève, 1962, p. 22; Ch. Tomuschat, "Zu einige Aspekten ihrer innerstaatlichen Durchfürung", ZaöRV, Vol. 33, 1973, p. 179 ff, p. 187; and Ch. Dominicé, "Représailles et droit diplomatique", in Recht als Prozess und Gefüge, Festschrift für Hans Huber zum 80 Geburtstag, Bern, 1981, p. 547.

219/ D. Anzilotti, op.cit., vol. III, p. 167. See also, recently, B. Conforti, op.cit., pp. 360-1.

220/ According to Röling, who recalls the ICJ judgement in the Hostages Case, "it would have been a good thing if the Court had had or taken the opportunity to make clear statement that those involved were persons against whom reprisals are forbidden in all circumstances, according to unwritten and written law even if the wrong against which a State wished to react consisted of the seizure of its diplomats! The provisions of the Convention are so formulated that 'reprisals in kind' are also inadmissible. It is possible to dispute the wisdom of this legal situation, but the arguments in favour of the current law - total immunity of diplomats because of the great importance attached to unhindered international communication - prevail". (B.V.A. Röling, "Aspects of the Case concerning U.S. diplomats and Consular Staff in Teheran", in Neth. YBIL 1980, p. 147). The same opinion is held by Dominicé, who wonders: "Que deviendraient les relations diplomatiques, en effet, si l'Etat qui, fût-ce à juste titre, prétend être victime d'un fait illicite, pouvait séquester un agent diplomatique ou pénétrer dans les locaux d'une mission en s'appuyant sur la doctrine des représailles?" (Ch. Dominicé, "Observations", op.cit., p. 63).

221/ F. Lattanzi, Garanzie, op.cit., pp. 317-318; O.Y. Elagab, op.cit., pp. 116 ff.

within the scope of a deviation from the general rules concerning the legal consequences of internationally wrongful acts, implicitly provided for at the time the primary relationship is established". 222/

116. A more articulate position is taken by others. One of these, for example, asks himself which obligations, among those intended for the protection of diplomatic envoys, would be inviolable by way of reprisals. According to this writer international practice indicates that not all the forms of reprisal against diplomats are considered unlawful. It would be difficult, for example, so to qualify measures enacted in order to restrict the freedom of movement of diplomatic envoys. 223/ It would be consequently possible, according to the cited author, to affirm that the unlawfulness of reprisals against diplomatic envoys covers essentially measures directed against the physical persons of diplomats, such measures consisting, essentially but not exclusively, in a breach of the rule of personal inviolability. The raison d' être of the restriction would reside of course in the necessity to safeguard, in any circumstances, the special protection which is reserved to diplomatic envoys in view of the particular tasks they perform. 224/

117. An adequate analysis of the practice should allow us - and the Commission - to espouse the most appropriate solution, de lege lata as well as from the viewpoint of progressive development. Here as elsewhere it should be considered that any restrictions inevitably reduce the possibility of reaction in even more sensitive areas than that of diplomatic relations. We think of areas of more general humanitarian interest: including vital economic relations.

222/ W. Riphagen, Fourth Report, op.cit., para 91, p. 17. It has to be recalled that Riphagen's draft Article 12 (a) providing that reprisals and reciprocity measures do not apply "to the suspension of the performance of the obligations ... of the receiving State regarding the immunities to be accorded to diplomatic and consular mission and staff", met with some reservations among the members of the Commission (Reuter, in YBILC, 1984, Vol. I, 1856th Meeting, para. 30; Sinclair, ibid., para. 27 and 1856th Meeting, para. 9; Arangio-Ruiz, in YBILC, 1985, Vol. I, 1900th Meeting, para. 21) and representatives in the Sixth Committee (Qatar, in Doc. A/C.6/40, SR.23, para. 106; Czechoslovakia, ibid., SR.29, para. 18; United Kingdom, ibid., SR.32, para. 26).

223/ A. De Guttry, op.cit., p. 282.

224/ Ibid., p. 283. In an analogous way, L.A. Sicilianos, op.cit., p. 351, according to whom "il y a certainement un noyau irréductible du droit diplomatique ayant un caractère impératif - l'inviolabilité de la personne des agents diplomatiques, l'inviolabilité des locaux et des archives - qui est de ce fait réfractaire aux contre-mesures. Il y a en revanche d'autres obligations qui ne semblent pas s'imposer forcément en toute hypothèse et qui pourraient, certes avec toute la précaution voulue, faire l'objet de contre-mesures proportionnées".

D. The Relevance of Jus Cogens and Erga Omnes Obligations

118. In addition to the absolute limits considered so far (as deriving from specific rules or principles of general international law), it must be considered that reprisals may be subject to further limitations. In particular, we refer to such restrictions as may derive from jus cogens. 225/

119. Limitations to the right of reprisal deriving from jus cogens are generally not mentioned in the literature preceding the Second World War. To jus cogens as a general limitation refer instead recently Reuter, 226/ Riphagen, 227/ Zemanek, 228/ Lattanzi, 229/ Gaja, 230/ Alland, 231/ Elagab, 232/ and Sicilianos. 233/ Although jus cogens has originally been considered (in the Vienna Convention on the Law of Treaties) in connection with the inadmissibility of conventional derogation from fundamental general rules, "[i]t would be illogical .... at the same time [to] admit that the breach of an obligation imposed by a peremptory norm is justified only because another State had previously violated an international obligation. The same applies when the previous violation also concerns an obligation imposed by a peremptory norm; the very existence of such a category of norms implies that there is a general interest in international society that they should be respected". 234/

225/ On these problems, see F. Lattanzi, op.cit., p. 306.

226/ P. Reuter, op.cit., p. 463.

227/ Riphagen covered the point under his draft Article 12 (b) according to which countermeasures and "reciprocity" measures would not be applied with respect to the obligations incumbent upon a State "by virtue of a peremptory norm of general international law".

228/ K. Zemanek, "La responsabilité des Etats pour faits internationalement illicites ainsi que pour faits internationalement licites", in Responsabilité internationale, Paris, 1987-1988, p. 84.

229/ F. Lattanzi, op.cit., pp. 306 ff.

230/ G. Gaja, "Jus cogens beyond the Vienna Convention", Hague Rec., Vol. 172, 1981-III, p. 297.

231/ D. Alland, op.cit., p. 185.

232/ O.Y. Elagab, op.cit., p. 99.

233/ L.A. Sicilianos, op.cit., pp. 340-344.

234/ G. Gaja, op.cit., p. 297.

120. Indeed, a part of the doctrine laments the absence, in the text of draft Article 30 of Part One of the Articles on State Responsibility, of a clear reference to contrast with jus cogens rules as an exception to the exclusion of unlawfulness of measures taken by way of reaction to an internationally wrongful act. We agree, however, with Gaja's notation that such an exception is implied in draft Article 30's expression "measure legitimate under international law". 235/ By its implied reference to the régime of reprisals that phrase would exclude the lawfulness of measures involving a violation of a peremptory rule. This interpretation is also supported by the express inclusion of the restriction in Professor Riphagen's draft Article 12 (b).

121. The limitation presently under discussion is extended by Lattanzi (from jus cogens rules) to any rule creating erga omnes rights and obligations. According to that writer: "There can be no doubt that the lawfulness of a reprisal consisting in a violation of erga omnes rules is excluded precisely by the fact that the violation of an obligation to the detriment of one State represents simultaneously in such a case a violation of the same obligation to the detriment of all the addressees of the rule. One could not admit that the sanction exercised against one State may consist in the violation of an obligation towards another State". 236/ Erga omnes rules are so structured - according to the cited author - that on the one hand any State party can claim compliance, on the other hand no State party may lawfully react to their infringement by another infringement. 237/ The same point is made by Gaja when he states: "One of the cases in which international law cannot allow countermeasures -.....- is when the obligation which is violated operates in specific cases towards other States: the rights of innocent States would then be necessarily infringed". 238/

122. It will not be overlooked that a largely similar problem (to that of erga omnes obligations) has already been touched upon with regard to suspension and termination of treaties. 239/ In formulating the draft Articles it will therefore be necessary to give careful thought, always in the light of the practice, to the question whether the absolute limitations traditionally recognized with regard to the admissibility of countermeasures (force, human rights, diplomatic envoys) should not be completed by the further condemnation not only of countermeasures taken in contravention to jus cogens rules, but also of measures infringing rules setting forth erga omnes obligations.

235/ Ibid.

236/ F. Lattanzi, op.cit., p. 314 (our translation).

237/ Ibid.

238/ G. Gaja, op.cit., p. 297.

239/ See paras. 81-83, supra.